MADURAI KAMARAJ UNIVERSITY

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DISTANCE EDUCATION

B.G.L.

FIRST YEAR

Paper - 1

BUSINESS LAW - 1

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B.G.L., First Year

Paper-1
BUSINESS LAW - I

MADURAI KAMARAJ UNIVERSITY
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Dear Student

The subject Business Laws-I introduce you one of the most important branches of the law of modern civilized life. Modern technology with its many applications give an impact to the development of this branch of law. Every common man in his day to day life enters into innumerable agreement knowingly or unknowingly of its legal implications. The Indian Contract Act of 1872, substantially embodies the principles of the English law of contracts, and it extends to the whole of India.

Business laws assure that what a man has promised to another shall be fulfilled. It is not all promises that are enforceable, but only those that create legal relationships or consequences. As every country is economically dependent on the other, and trade and commerce are ambulatory in character and everyone, day in and day out are entering into contracts a study of this branch of the law becomes necessary.

The whole subject relating to business laws is divided into two papers, for your convenience. Business laws I consists of general principles of contract and Specific Relief Act 1963 and the Business laws – II consists of the rest of the topic namely Special contracts. Business Laws I is divided into 10 Units.

A number of English and Indian case laws and illustrations have been incorporated in this subject. Moreover, for your guidance, we have included the detailed syllabus, the scheme of lessons, the books to be studied and the model question paper.

Good luck,

Department of Law
DDE

B.G.L. (First Year)

BUSINESS LAWS – I

SYLLABUS

Unit No. 1 : **General Features of Contract :** Objects of contract – Definition – Indian and English law – Essential elements of contract – Intention to create legal obligation – classification – void. Voidable and unenforceable contracts – Express and implied contracts – unilateral and bilateral contract – classification of contracts under English Law - Theory of consensus.

Unit No. 2 : **Formation of contract :** Offer and acceptance –offer and Invitation to treat – Communication of offer and acceptance - Offer and acceptance by post, telephone, telegraph etc – Revocaton of offer and acceptance – termination of offer – Terms of contract : warranty, condition – fundamental obligation – Ticket cases.

Unit No. 3 : **Consideration :** Definition – Indian and English law. Executed Executory and past – Adequacy and reality of consideration, Performance and reality of consideration – Performance of existing duty – Privity of contract and privity in consideration – Agreement without consideration is void and the Exceptions – Consideration in discharge of contract – Pinnel's case – High Trees case – Composition with creditors – Difference between English and Indian law.

Unit No. 4 : **Capacity to contract :** Infants – Lunatics and drunkard persons – Alien enemies; corporation; foreign sovereigns and ambassadors and married women – Infant relief Act of 1874 – Beneficial contracts of service – Equitable doctrine of Restitution – Delictual Liability – English and Indian Law.

Unit No. 5 : **Free consent :** Coercion – duress-undue influence – Misrepresentation innocent or fraudulent – Elements of an effective representation – Effects of representation – Can silence amounts to representation – Misrepresentation Act of 1967 – Representation which is a term of contract or mere representation – condition or warranty – Limits of right to rescind – Unconscionable bargains – Mistake of Fact and law – as to identity – as to title – as to the existence of the subject matter – as to quality – as to the written contract (non est factum) – Error in verbis – Error in 'causa' – Difference between English and Indian law.

Books for Referance :

1.	Anson	-	Contracts
2.	Avtar Singh	-	Law of contract and specific Relief
3.	Mulla on 'The Indian Contract Act'. (Student Edition)		
4.	Prof. G.C.V. Subbarao	-	Law of contracts (I & II)
5.	Prof. G.C.V. Subbarao	-	Specific Relief Act
6.	T.S. Venkatesa Iyer's	-	Treatise on Law of contracts
7.	M. Krishnan Nair	-	The Law of contracts
8.	N.D. Kapoor	-	Business Law
9.	R.C. Chawla & K.C. Garg	-	Commercial Law
10.	V. Kesava Rao	-	Contracts - 1, cases and Materials.

Statutory Material

1. Indian Contract Act, 1872.
2. Specific Relief Act, 1963.

SCHEME OF UNITS

UNIT NO.	TITLE	PAGE No.
1.	GENERAL FEATURES OF CONTRACT	1
2.	OFFER AND ACCEPTANCE	20
3.	CONSIDERATION	51
4.	CAPACITY TO CONTRACT	78
5.	FREE CONSENT	101
6.	LEGALITY OF OBJECT	139
7.	PERFORMANCE OF CONTRACT	182
8.	DISCHARGE OF CONTRACT	206
9.	QUASI - CONTRACTS	236
10.	SPECIFIC RELIEF ACT 1963	254

UNIT – 1
GENERAL FEATURES OF CONTRACT

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INTRODUCTION

The Law of contract is the most important branch of mercantile law. It is not a new subject because in our day to day affairs, we are entering into a number of contracts though we may be unaware of it. It provides the legal frame work for formulation of trade, business and commercial transactions and defines the remedies of the aggrieved party in a contract, which are available in a court of law.

UNIT OBJECTIVES

- ❖ To study the meaning and nature of contract.
- ❖ To understand the essential elements of contract
- ❖ To learn about various kinds of contracts.

UNIT STRUCTURE

1.1 Nature and scope of contract

1.2 Definitions

1.3 Essential elements

1.4 Classification

1.5 Summary

1.6 Key words

1.7 Answers to check your progress

1.8 Model questions

1.1 NATURE AND SCOPE OF CONTRACT

The law relating to contracts is contained in the Indian contract Act, 1872. It came into force on the 1st day of September, 1872. It applies to the whole of India except the state of Jammu and Kashmir. It does not profess a complete and exhausive code. This Act deals with the general principles of law of contract and some special contracts only. Generally, law of contract differs from other branches of law in an important aspect. It does not lay down a number of rights and duties which the law will protect or enforce. But it consists a number of limiting principles subject to which private parties for themselves may create the rights and duties which the law will uphold.

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In the subject of Business law-I, you are going to study about general principles of the contract embodied in sections 1 to 75 of the Indian Contract Act.

1.1.1 OBJECT OF CONTRACT

The purpose of the law of contract is to ensure the realisation of reasonable expectation of the parties who enter into a contract. **Sir William Anson** observes in this connection that the law of Contract is intended to ensure that what a man has been led to expect shall come to pass, and that what a man has been promised to him shall be performed. Everyone of us are entering into a number of contracts from sunrise to sunset without our least knowing it. Whether it be for purchase of a cake or soap, or a ticket to see a film in a theatre, one will be entering into a contract. The object and function of the law of contract is to see that, as far as possible, expectations created by promises of the parties are fulfilled and obligations prescribed by the agreement of the parties are enforced.

The law of contract deals with rights in personam as distinguished from rights in rem.

(a) Rights in Personam

It means the right against a particular person, For (e.g.) If a has a right to recover a sum of Rs. 10,000 from B, that right can be exercised only against him, but not by others, because the right which A has against B is a right in personam. A cannot enforce that right against anyone else except B.

(b) Right in Rem

Right in Rem means the right against the whole world. For (e.g.) 'A' owns a plot of land and B is the adjacent owner. The right of 'A' to have uninterrupted possession and enjoyment of that land is available not only against 'B' but against every member of the public. Everyone except 'A' is under an obligation not to interfere with A's possession or enjoyment because the rights of A inrespect of that land are rights in rem. The rights to property are all rights in rem while contractual rights are rights in personam.

As a result of modern civilization, people enter into contract with each other in various capacities like employer and employee, seller and buyer, principal and agent, landlord and tenant etc. A knowledge of commercial law is particularly necessary for people who are engaged in commercial activities, becuase these people enter into a number of contracts giving rise to various rights and obligations. The law of contract lays down the principles subject to which their rights and obligations are enforceable by law. Thus, the law of contract introduces

definiteness in mercantile transactions. It's object is to enforce the obligations of the contracting parties which are enforceable by law.

1.2. DEFINITIONS

The word "Contract" is derived from the latin term "Contractum" which means "drawn together". It denotes a drawing together of two or more minds to form a common intention to an agreement.

Many jurists defined the term 'contract'. **Anson** defines, contract is "A legally binding agreement between two or more persons by which rights are acquired by one or more, to an act or forbearance on the part of the other or others".

Pollock defines a contract as, "An exchange of promise by two or more persons, resulting in an obligation to do contract consists of an actionable promise or promises".

Salmond defines "contract is an agreement creating and defining obligations between the parties".

Halbury's Laws of England defines "A contract is an agreement made between two or more persons which is intended to be enforceable at law".

The Interpretation clause, in section 2 of the contract Act, gives some important precise definitions of the following terms which are relavant with contract.

Contract : (Section 2(h))

"An agreement enforceable by law is a contract".

Agreement : (Section 2(e))

"Every promise and every set of promises forming the consideration for each other is an agreement".

Promise : (Section 2(b) & (c))

"When the person to whom the proposal is made signifies his assent there to, the proposal is said to be accepted. A proposal when accepted becomes a promise".

The person making the proposal is called the promisor and the person accepting the proposal is called the promisee.

Proposal : (section 2(a))

When one person signifies to another his willingness to do or to abstain from doing any thing, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

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Check Your Progress Questions

2. Define contract.

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In English Law, the terms "offer", "offeror", and "offeree" are used corresponding to the terms proposal, promisor and promisee.

1.2.1. MEANING OF CONTRACT

You must first understand the meaning of the term contract. According to Section 2(h), a contract is an agreement enforceable by law. This definition will clearly show that only an agreement which is not enforceable by law is not a contract. For example, if A enters into a contract to sell his car to B for Rs. 10,000 on a certain date and if A has not acted as agreed then B can enforce the contract through a court of law. Thus, a contract results from a combination of the two constituents of agreement and obligation.

A promises to pay Rs. 50,000/- to B for murdering D and B agrees to murder D for the sum of Rs. 50,000/-. This contract can not be enforced by B even if he murders D. Such a contract between A and B is illegal and unenforceable in a court of law..

1.3. ESSENTIAL ELEMENTS OF A VALID CONTRACT

As a general rule, "All contracts are agreement but all agreements are not contracts". An agreement is regarded as a contract when it is enforceable by law. The conditions of enforceability are stated in Section 10 of the Contract Act.

According to this section, "an agreement is a contract when it is made for some consideration between the parties, who are competent, with their free consent and for a lawful object and not expressly declared to be void".

From the rule stated in Section 10, the following are the essential elements necessary to constitute a valid contract and an agreement becomes a contract when the following conditions are satisfied.

1.3.1.TWO PARTIES

A contract is a legally binding agreement. There must be two parties to an agreement. The agreement results when one person making a proposal or offer and the another person to whom the proposal is made accepts it. It is impossible for one person to make an agreement with himself, for an agreement to arise, there must be two or more parties to the transaction. At this stage, it is very important to note that Contract Act defines an agreement as every promise and every set of promises, forming consideration for each other. "So a contract consists in an actionable promise or promises. Every such promise involves two parties,viz, a promisor and a promisee

Check Your Progress Questions

1. What is meant by an agreement?

1.3.2. OFFER AND ACCEPTANCE

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The proposal or offer and its acceptance is an essential element for a valid contract. The proposal is the starting point in an agreement.

At the inception of every agreement there must be an offer by one person to another and it's acceptance by the person to whom it is made.

An offer is a proposal by one person to enter into a legally binding agreement with another. Acceptance is an expression by the promisee of his willingness to the terms of the offer.

The contract emerges from the acceptance of an offer. One of the most important factors in the formation of a contract lies in arriving at an agreement between the contracting parties by means of offer and acceptance.

The proposal is defined in Section 2(a) thus : "where one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent or that other to such act or abstinence he is said to make a proposal".

Section 2(b) defines an acceptance thus "when the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted". A proposal when accepted becomes a promise.

Acceptance is the manifestation by the offeree (promisee) of his assent to the terms of the offer. Acceptance must be of only that which is offered.For example : 'A' writes a letter to 'B' by offering to sell his house for Rs. One Lakh. If 'B' is willing to pay Rs. One Lakh and if 'B' writes a letter agreeing to the proposal, it is called an acceptance. Here, 'A' is called the offeror or promisor and 'B' is called the offeree or promisee.

The terms of the offer must be definite and the acceptance of the offer must be absolute and unconditional. These two elements are important for a contract. As a matter of fact most contracts are reducible by analysis to the acceptance of offer.

In the case of **Taylor Vs. Portington (1855)** A promised to B to take a lease of a house for 3 years at £ 85 per annum, if the house was thoroughly repaired and the drawing rooms decorated according to the present style. It was held, that the terms were too uncertain and that the promise could not be enforced.

1.3.3. CONSIDERATION

Consideration is another essential requisite of a valid contract. An agreement must be supported by consideration. In simple words, consideration means **'something in return'**. A contract results only when one promise is

Check Your Progress Questions

6. When does an agreement become a contract?

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made in exchange for something in return. Under Roman Law, an agreement without consideration was called a nudum pactum (i.e.)naked agreement . Under English law, simple contracts must be supported by consideration. Generally, A promise to do something, getting nothing in return is not enforceable by law.

In fact, consideration is a technical term used in the sense of **quid pro quo** (something in return) and must be either a benefit to the promisor or a detriment to the promisee or both. Consideration is defined in Section 2 (d) as : "when at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing or Promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise". For example, A agrees to sell his house to B for Rs.5,00,000. For A's promise the consideration is Rs.5,00,000. For B's promise the consideration is the house. This contract is enforceable and is supported by consideration.

Consideration must be real, and should not be vague. Other wise the contract is void. The other important point is that the consideration must be lawful, i.e.,it must not be of an immoral nature, or contrary to public policy. For example: A promises to pay Rs. 20,000 to B to murder 'D'. Here the consideration of Rs. 20,000 is illegal.

In **Abdul Aziz Vs. Masum Ali (A.I.R. 1914 All 22)**: A promised to B to subscribe a sum of money for rebuilding a mosque, but failed to pay the amount. In a suit upon the promise, it was held that there was no consideration, either in the sense of any benefit or advantage or a detriment to the promise, and that the contract is void.

1.3.4. CAPACITY OF PARTIES

The parties who enter into a contract must have the legal capacity. The parties to the contract must be legally capable of entering into an agreement, otherwise it cannot be enforced by a court of law. Capacity means competence of the parties to enter into a valid contract. A party's incapacity to enter into a contract may arise either on account of status or on account of mental deficiency. Sections 11 & 12 of the contract Act, deal with the competency of parties. A person is capable to enter into a contract, if he is a major, sound minded and not disqualified by any law.

Incapacity arising from the status of an individual may be due to any of the following reasons. 1. political or civil status.For example: Foreign sovereigns and ambassadors 2. Alien enemy, 3.Convicts 4. Insolvent 5. Corporation .

Incapacity due to mental deficiency of the contracting person arises in the following cases.

1. Minors, 2. Insane persons, 3. idiots, 4. Drunkard or intoxicated persons.

According to section 3 of the Indian Majority Act, 1875, a minor is a person who has not completed the age of 18 years. A person attains majority on completing his 18 years in India and 21 years in England. Even in India, if the property of a minor is under the management of the Court of Wards, or a guardian is appointed by court for the minor or his property or both, he attains majority only on completing the age of 21 years. The estate of the minor is liable in certain cases. A minor's estate is liable to reimburse the trader in the cases of necessaries supplied to the minor or to his dependants for his consumption. For example "A" supplies some clothes and rice to a minor "B". Here, he can recover the price from the minor's property.

In **Mohari bibi Vs. Dharmadass Ghose,** (1903) 30, Cal. 539, a minor mortgaged his house infavour of a money to secure a loan of Rs. 20000/- out of which, the mortgagee paid the minor a sum of Rs. 8,000/-. Subsequently, the minor sued for setting aside the mortgage. It was held that the mortgage was void, since it was executed by the minor.

1.3.5. FREE CONSENT OF THE PARTIES

Another essential element to an agreement is that there must be free consent of the parties to the agreement. An agreement is valid only when it is the result of the "free consent" of all parties to it. There should be no flaw in the consent of the parties. A consent may be defective either on account of mistake in the minds of parties or on account of consent not being free. The consent to an agreement is not free and genuine consent if the agreement is induced by coercion, undue influence, mistake, misrepresentation or fraud. When there is no consent, there is no contract. But when there is consent but it is not free, the contract is voidable at the option of that party whose consent is obtained by way of coercion, Undue influence etc.

For example : A is forced to sign a promissory note at the point of a pistol. In this case, even though he is signing, his consent is not free and the contract is voidable at the option of one of the parties to the contract. In **Ranganayakamma vs. Alwarchetty (1889)** a young widow of 12 years of age was forced to adopt a boy under the threat of preventing the dead body of her husband from being removed for cremation. It was held that her consent was not free but induced by coercion, as any person who obstructed a dead body from

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being removed would be guilty of an offence under Section. 297 of the Indian Penal Code. Hence, the adoption was set aside.

1.3.6. CONSENSUS AD IDEM (IDENTITY OF MIND).

Under Section 13, 'two or more persons are said to consent when they agree upon the same thing in the same sense. Such a meeting of minds creating an identity of opinion is referred in the term of consensus ad-idem. The parties to the contract must have agreed about the subject matter of the contract at the same time and in the same sense. In other words there must be identity of minds. For example: A who owns two houses, one at Mumbai and another at Chennai offers to sell one house, to B. B accepts the offer thinking to purchase the house at Mumbai, while A when he offers, has in mind to sell the house at Chennai. Here is no consensus ad idem between the parties. Moreover, even though both parties to the contract are thinking about the subject matter of the contract, there must be an expression of mental assent which is necessary to complete a binding agreement.

For example, If 'A' an auctioneer is auctioning a wall clock and is starting the auction with Rs.100/- as price for the wall clock. 'B', a person in the crowd raises his hand while looking at the auctioner and the auctioner after making three calls, rings the bell and says wall clock sold for Rs.100/- to 'B'. Here the action of 'B' in raising his hand will amount to an offer and once the auctioneer made the three calls and rang the bell, the offer is said to be accepted. 'B' the person who raised his hand cannot be allowed to say that when he raised it, he did not mean to make an offer, but was merely stretching his arm. What was in his mind is immaterial because it was reasonable for the auctioneer to assume that the man's intention was an offer.

An error in consenting mind is known as error in consensus and this error is the result of the mistake.

In **Raffles Vs. Wichelhaus :** (1862) a contract was entered into for the purchase of 125 bales of cotton to arrive by a ship called 'Peerless' from Bombay. Two ships of the same name were to be sail from Bombay. The vendor intended to send the goods by 'Peerless' Ship sailing in December, while the purchaser intended to receive them by 'Peerless' selling in October. In a suit by the vendor, the court held that the parties were under a mistake as to the identity of the subject matter and there was no contract. Therefore, the parties entering into a contract must have identity of minds.

1.3.7. LAWFUL OBJECT

The purpose or object of an agreement must be lawful. Agreements should not be illegal or void or opposed to public policy. The consideration as well as

the object of the contract must be lawful. For example: If A promises to pay Rs. 2000 to 'B' for letting B's house for the purpose of running a gambling house, the promise between A and B will not be enforced in a court a law, because the object of the contract is unlawful and void. The object is said to be unlawful if (a) it is forbidden by law.

(b) it is of such nature that if permitted it would defeat the provisions of any law.

(c) it is fradulent.

(d) it involves an injury to the person or property of anyother.

(e) the court regards it as immoral or opposed to public policy.

In the case of **Pearce Vs. Brooks** (1886) L.R.Ex 213 A firm of coach builder hired out a carriage to a prostitute, knowing that it was to be used for the purpose of prostitution. It was held that, the coach - builders could not recover the hire charges as the agreement is illegal.

1.3.8. POSSIBILITY OF PERFORMANCE

The agreement must be capable of being performed. A promise to do an impossible act can not be enforced in a court of law.

For example : A agrees with B to discover treasure by magic or 'A' agrees to pay Rs.1,000 to 'B' if 'B' runs 100 Kms with in one hour. These agreements are void because of the impossibility of performance. An agreement to do an act impossible in itself is void. A contract may become impossible of performance by subsequent events also.

A contract which at the time of it's formation, was impossible to perform is void abinitio and creates no rights and obligations. A contract, which at the time of its formation was capable of being performed and subsequently it becomes impossible to perform or unlawful, in such cases the contract becomes void.

In **Howell Vs. Coupland (1871, Q.B. 258)** a person contracted to deliver 200 tons of potato's from a particular field. The potatos were destroyed by pest. Held that, the contract becomes void due to impossibility of performance.

1.3.9. LEGAL FORMALITIES

Oral contract is also perfectly valid contract except in those cases where writing, registration etc, is required by some statute. A contract may be either oral or written. However, there are some other formalities which have to be complied with in order to make an agreement legally enforceable. In some cases, the document should be in writing, and it should be properly registered. For example: In the cases of sale, mortgage, lease, gift of immovable property etc,

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writing is required. **Registration** is required in cases of documents coming within the scope of Section 17 of the Registration Act. According to Section 10 Para 2, where there is a statutory requirement that a contract should be made in writing or registered etc, the required statutory formalities must be complied with.

1.3.10. INTENTION TO CREATE LEGAL OBLIGATION

According to English law, there is a further requirement of a contract viz, an **intention** to create legal obligation or relationship between the contracting parties. This principle is followed in India also. As already stated, contract is an agreement enforceable by law. Therefore all unenforceable agreement are not contract. An agreement will not bind the parties to the contract unless there is an **intention** to enter into legal **obligations**. This means that agreements, which give rise to legal obligations **alone** will be binding on the parties and which the law will enforce. The parties to the contract must intend that the transaction should be attended by Legal consequences and create Legal Obligations.

When two parties enter into an agreement, their intention must be to create legal relationship among them. If there is no such intention on the part of the parties, no contract will arise between them. Therefore all agreements cannot result in legally enforceable contracts. Agreements may relate to social matters and they may **not** be intended to have any legal consequences. Such agreements of a social or domestic nature do not contemplate legal relationship. For example, 'A' Invites his friend 'B' to dinner. 'B' accepts his offer but he fails to go to dinner. Here 'A' cannot legally enforce the contract. Likewise the acceptance of an invitation to a Tea Party, Cinema or to play in a foot ball or Cricket Match etc., forms an agreement. But it is not possible to file a suit in a court of law for enforcing the contract or to claim compensation in case of breach of contract.

In the case of **Balfour Vs. Balfour (1919) 2 KB 571,** Mr.Balfour who employed in Ceylon promised his wife in England to send £40 every month as a household allowance. But he failed to pay that amount. The wife sued for the said amount. It was held that this agreement was not a contract enforceable in a court of law. **Lord Atkin** observed that,

"The most usual forms of agreement which do not constitute a contract are the agreements made between husband and wife. They are not contracts because the parties do not intend that they should be attended by legal consequences".

But it does not mean that all domestic agreements never have legal consequences. When they relate to property and promises have been carried out on one side, it may be held that, the agreement was intended to have legal

relationship or consequences. In the case of **Merritt-vs- Merritt (1970)** 2 All.ER.760, a husband who was living with another woman gave a written promise that if his wife who has been living in his house discharged the mortgage on the house, he would transfer the property to her. On the promise, she also discharged the mortgage. It was held that her husband was bound to transfer the property to her.

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In the case of **Weeks Vs. Tybald [1604, 74 E.R.982]** , the defendant in the course of a casual conversation said that he would give £100 to anyone, marrying his daughter with his consent. The plaintiff married his daughter with his consent but the defendant did not give that amount. So the plaintiff sued for the amount of £100. It was held that such general words spoken, could not be taken as seriously intended and therefore the defendant was not liable to pay that amount to the plaintiff.

In **Montreal Gas Co. Vs. Vasey [1900 A.C. 595]** , a company agreed with the defendant that on expiration of the defendant's existing contract, they would 'favourably consider' the renewal of his contract. It was held that no obligation was created to renew the contract.

Parties to the contract are free to make their own agreement. If they agree that breach by either party will not give rise to legal rights, there is no contract, even though the offer and acceptance have been reduced in to writing. Here, the intention not to create legal obligation is expressly stated. Thus, in order to create a contract, there must be common intention of the parties to create legal obligations, mutually communicated expressly or impliedly.

In India section 10 of the Indian contract Act which deals with essential requisites of a valid contract does not stipulate intention to create legal oblitation as a requisite for a valid contract. But, according to section 29 of the contract Act, agreements the meaning of which is not certain, or capable of being made certain, are void. Therefore, in every agreement, the obligation created by the agreement must be clearly understood by the parties in order to enforce the contract in a court of law.

Thus, all the elements mentioned above must be present in an agreement, in order to become a valid contract. If anyone of them is absent, the agreement does not become a contract.

1.4. CLASSIFICATION OF A VALID CONTRACT

Under India law, contracts may be classified according to their (i) formation (ii) validity and (iii) performance or execution, for easy understanding.

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1.4.1. CLASSIFICATION ON THE BASIS OF FORMATION

The contracts may be classified according to the mode of their formation as follows.

(a) Express Contract

If the terms of a contract are expressly agreed upon by words written or spoken at the time of formation of the contract, the contract is said to be express contract. Section 9 of the Contract Act lays down that a contract is said to be express when it is entered into by words spoken or written. So, an express contract is one which may be created either in the form of writing or orally but the terms of which explicitly and clearly stipulated and agreed between the parties. For example, 'A' writes a letter to 'B' offering to sell his car to 'B' for Rs. 50,000 and 'B' also writes a reply letter to 'A' agreeing to purchase his car for Rs. 50,000. It is an express contract.

(b) Implied Contract

An implied contract is one which is inferred from the acts or conduct of the parties and circumstances of each case or course of dealings between them. An implied contract is also known as tracit contract.

For example, 'A' city bus is going to Mylapore from Parry's Corner. 'A' enters into the bus for going to Mylapore. At the moment 'A' enters the bus a contract comes into existence. Here in this particular example, the conductor of the bus offered to take passenger from Parry's Corner to Mylapore for a particular fare and when 'A' is entered into the bus, it means that he accepted the offer. If the conductor demand the bus fare from A, he is bound to pay the fare. Therefore, an implied contract is one in which the evidence of agreement is not shown by written words or spoken but inferred by acts and conduct of the parties.

(c) Quasi Contract

Quasi contract is not at all a contract created by parties. It is created by law. It resembles a contract in which a legal obligation is imposed on a party who is required to perform it. It is otherwise called as constructive contract. It is based on the principle of equity (i.e.) No one shall unjustly enrich himself at the cost of another person. [For details refer Unit No.9 "Quasi Contract"]

1.4.2. ON THE BASIS OF VALIDITY

(a) Valid Contract

An agreement enforceable by law is a valid contract. When all the essential elements are present in a contract, it is enforceable by law, as laid down in section 10 of the contract Act. A Valid contract is fully operative in accordance with the

Check Your Progress Questions

4. What is an express contract?
5. What is an implied contract?

intention of the parties. For example 'A' offers to sell his plot to 'B' for 2 lakhs. 'B' also agrees to buy it. It is a valid contract. "All contracts are agreements, but all agreements are not contracts". To be a valid contract, an agreement must be enforceable at law. For example 'A' and 'B' agree to smuggle Gold into India, it will not be a Valid Contract as it is not enforceable by law. Under Section 10 of the Contract Act, all agreements are valid contracts, if they are made,

[i] By the free consent

[ii] Parties competent to contract

[iii] For a lawful consideration & lawful object and

[iv] which are not expressly declared to be void

All the above said requirements must be present in a valid contract. In other words, these requirements are conjunctive and not disjunctive. All of them co-exist in every valid contract.

(b) Void Contract

A contract not enforceable by law is void. Section 2 (g) defines, 'an agreement not enforceable by law is said to be void" A void agreement does not create any legal rights or obligations. According to section 2(j) "a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable." A void contract is an agreement without any legal effect. It is a nullity in the eye of law. It confers no rights to any person and creates no obligations. A void contract is not enforceable at the instance of either party. A contract may be void from the beginning (ab-initio) or it may become void subsequent to its formation.

For example (1) A contract by a minor or a lunatic, (2) a contract without consideration, (3) agreement in restraint of marriage, (4) an agreement in restraint of trade, (5) an agreement to do an impossible Act etc. Instances of void contracts are provided for in sections 20, 23 to 30 of Indian Contract Act.

For example 'A' agrees to lend money to a woman in consideration of getting a divorce from her husband and then re-marrying the money lender is void agreement.

An agreement which was legal and enforceable when it was entered into may subsequently become void due to impossibility on performance by change of law or other reasons.

For example (1) A and B contract to marry each other. Before the fixed period for marriage 'A' becomes mad. Here the contract becomes void.

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Check Your Progress Questions

3. Distinguish between void and voidable contract?

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(2) 'B' entered into a contract whereby 'A' agrees to purchase Alcoholic liquor from 'B'. But the law prohibiting the sale of liquor is enacted subsequent to the contract. Here also the contract becomes void.

In **Baily Vs. De Crespigny**, 'A' while purchasing a plot from 'B' agreed not to construct buildings on the site. Subsequently by an Act of parliament, the site was acquired by a railway company and buildings were raised thereon. In a suit by 'B' against 'A' for breach of the agreement, held that 'A' was discharged from liability, as compliance with the agreement became impossible by subsequent legislation. Therefore it will be seen that a contract which is not enforceable by law is said to be void.

In the case of **Foster Vs. Mackinnon,** an old illiterate man of feeble sight endorsed a bill of exchange, thinking it was a guarantee. There was no negligence on his part. It was held that there was no contract.

(c) Voidable Contract

According to Section 2(i) of the Contract Act. "An agreement which is enforceable by law at the option of one or more of the parties there to, but not at the option of the other or others" is a voidable contract. A contract is said to be voidable where the consent to a contract is not free or genuine one. This happens when the essential elements of free consent is missing in a contract. A contract brought about as a result of fraud, coercion, undue influence, mis-representation would be voidable at the option of the person whose consent was caused by anyone of the aforesaid factors. . Such a contract is good until it is avoided. Once it is avoided, it is void. But if the party chooses to affirm it, the contract continues to be valid. The law gives an option to one party to a contract either to affirm it or to avoid it if he so chooses.

For example A promises to sell his house to B for Rs. 50,000. His consent is obtained by use of force or coercion. These contracts are voidable at the option of A. In such cases, he may avoid the contract or elect to be bound by it.

Voidable contract is valid if the party entitled to avoid it either affirms it or fails to avoid it within a reasonable time, before the position of parties becomes altered or before a third party has acquired some bona-fide rights.

Distinction between void and voidable contract.

(i) A void contract is a nullity and no right would accrue there under from its commencement; whereas a voidable contract takes its full and proper legal effects until it is set-aside.

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(ii) A void agreement from the very beginning, has no legal effects. It is unenforceable at law. A void contract is one in which one of the parties may affirm or reject the contract at his option.

(iii) In the case of void contract, even a third party cannot acquire any right from a person claiming under such contract; but in the case of a voidable contract a third party can acquire a valid title from a person claiming title under such contract, provided the title has been acquired by him before the contract.

(iv) The defect in the case of voidable contract is curable and may be condoned. But a void agreement is void ab-initio and its defects are incurable.

(v) A voidable contract does not affect the collateral transactions, but the void agreement an account of illegality of the object, the collateral transactions will also become void.

(vi) In void agreement, there is no question of compensation for non-performance of the agreement. Because it is un-enforceable through court of law; where as in the case of voidable contract, a person is entitled to compensation for loss or damage suffered by him for non-performance of the contract.

(d) Unenforceable contract

Unenforceable contract is a contract which is other wise valid but cannot be enforced on account of some technical defect, like want of written form or stamp. The term unenforceable agreement is used in English law. It means an agreement which cannot be enforced by a court of law because of some technical defect. For example : Want of registration, or non payment of requisite stamp duty and, it becomes enforceable in future if the technical defect is cured. Now let us see an illustration in this regard. 'A' borrows Rs.10,000/- from 'B' and executed a Pro-note in favour of 'A'. But the required revenue stamp is not pasted on the pro-note. Here this agreement eventhough complete is unenforceable because of the technical defect of want stamp. i.e. Pronote being under stamped.

(e) Illegal Contracts

A contract which is either criminal in nature or which is immoral or against the public policy is an illegal contract. When an agreement is made for any illegal or immoral purpose or object, such agreements are void ab initio. For example if A agrees to murder B for Rs. 5,00,000/- such agreement is illegal one and it cannot be enforceable by law. Thus a contract to commit murder is an illegal contract and cannot be enforced by law. An illegal contract should be distinguished from a void contract. Both are unenforceable in law. But every

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illegal agreement is void but all void agreements or contracts are not illegal. For example Minor's agreement and wagering agreements are void but not illegal. Every void contract is not illegal unless its object or consideration is immoral or opposed to public policy etc.,

A void contract does not affect a collateral contract but when a contract is illegal, collateral contracts depending thereon are also void. For example 'A' borrows Rs.10,000/- from 'B' for the purpose of smuggling goods 'B' also knows the purpose of the loan. Here the agreement between 'A' & 'B' which is collateral to the main agreement for smuggling which is illegal. This collateral agreement is also illegal one.

1.4.3. ON THE BASIS OF EXECUTION OR PERFORMANCE

(a) Executed Contract

When in a contract, both the parties have performed their part of legal obligations it is called an executed contract. For example: A enters into a contract with B to deliver 20 bags of rice to B for Rs. 10,000. If B has paid Rs.10,000 to A and if A has delivered 20 bags of rice to B as per the contract , it is an executed, contract. Thus, when both the contracting parties performed their obligations, the contract is said to be executed. An executed contract is one, that has been completely performed.

(b) Executory Contracts

When in a contract, both parties have not yet performed their part of legal obligation it is called executory contract. In other words under the terms of a contract, something remains to be done. For example A promise to pay Rs.10000 to B and B promises to deliver 20 bags of rice to A. The contract is executory because A has not yet paid Rs.10000 and B has not yet delivered 20 bags of rice.

(c) Unilateral Contract

Unilateral contract is one where only one of the parties to the contract has performed his part of contract even at the time of formation and where the other party has an obligation to perform his part of contract. For example, if a railway porter carries the luggage of the passenger and place it in the carriage, the passenger has an obligation to pay the charge for it. Therefore unilateral contract is contract in which one party to the contract has performed his part of work at the time of the contract and the obligation is outstanding only against the other.

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(d) Bilateral Contract

This type of contract comes into existence by the mutual exchange of promises on either side and leave the obligations on both side outstanding. In a bilateral contract, at the time of its formation there will be two outstanding obligations on each party to the contract. For example, if A promised to pay Rs. 1000 to B and B promised to deliver twenty bags of rice in three months, there is a bilateral contract.

1.4.4. CLASSIFICATION OF CONTRACTS IN ENGLISH LAW

In English law, contracts are classified into (i) formal contracts and (ii) simple contracts.

(i) Formal Contracts

These include (a) Contracts of record and (b) Contracts under seal.

(a) Contracts of record

They are obligations imposed by law. They are not contracts in the true sense of the word and it does not refer to any mutual assent of parties. Contracts of record are of two kinds.

(a) Judgement of a court of record

(b) Recognizance

A judgement is an obligation imposed by a court upon one or more persons infavour of others. It is binding on the parties to the action and the obligation is imposed by judgement (e.g.) to pay damages.

A recognizance is a written acknowledgement of a debt due to the crown. For example, when a person is arrested, he may be released on a promise to appear in a court, subject to payment of money by penalty, if the obligation is broken. This obligation is called recognizance.

(b) Contracts Under Seal

A contract under seal is a written covenant which is signed, sealed and delivered by the parties. It is also called a deed or a specialty contract. No consideration is necessary in these contracts.

(ii) Simple Contracts

All contracts which are not made under seal are simple contracts. They may be in writing or may be made by oral words. All simple contracts must be supported by consideration. It is also known as parol contracts.

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1.5. SUMMARY

From the above discussion, we hope that you are able to understand about the essential elements of a valid contract and the classification of contracts under English law and Indian law. A contract is a legally binding agreement between two or more parties. An agreement comes into existence by the process of offer by one party and its acceptance by other party. The contracts are classified as (i) valid, void, voidable, unenforceable and Illegal contracts (ii) express, implied and quasi contracts (iii) executed, executory, unilateral and bilateral contracts. In this unit, many case laws and examples are given for your easy understanding.

1.6. KEYWORDS

1.	Abstain	-	Keep voluntarily away from doing something
2.	Aggrieved	-	A person who has suffered a grievance or Wrong
3.	Constructive	-	Derivative or inferential; it means that the act or thing inferred does not exist, though it is expedient, for certain legal purposes, to presume that it does.
4.	Enforceable	-	put into force, execute
5.	Manifest	-	To show clearly (or) to appear
6.	Offer	-	An expression of readiness to do something
7.	Obligation	-	An obligation is the bond of legal necessity which binds together two or more individuals
8.	Refrain	-	Avoid (or) to keep oneself away from action
9.	Reimburse	-	refund; Pay back
10.	Valid	-	good or adequate in law; legally binding or efficacious
11.	Void	-	A mere nullity; an agreement is said to be void when it is not enforceable by law [Sec.2(g) of contract Act]

1.7. ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **1.2.1**
	Question No.2	...	Refer Section No. **1.2**
	Question No.3	...	Refer Section No. **1.4.2**
	Question No.4	...	Refer Section No. **1.4.1**
	Question No.5	...	Refer Section No. **1.4.1**
	Question No.6	...	Refer Section No. **1.3**

1.8 EXERCISE QUESTIONS

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A. Short answer Questions

1. Distinguish between (i) Valid, void, voidable contract (ii) Express and implied contract (iii) Executed and Executory contracts (iv) Unilateral and Bilateral contracts.
2. Write short notes on:
   a. Consensus ad idem.
   b. Intention to create legal relationship.
   c. Unenforceable & Illegal contract.

B. Long answer questions

1. What is the nature and object of law of contract?
2. Define contract and what are the essential elements of a valid contract?
3. "All agreements are not contracts but all contracts are agreements" – Discuss.
4. Write the classification of contracts under Indian law and English law.

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UNIT - 2
OFFER AND ACCEPTANCE

INTRODUCTION

We have already seen that for a valid contract, certain essential elements are necessary. In every contract, there must be an agreement. In order to form an agreement, two essential elements are necessary. They are offer and acceptance. An offer is only a proposal and acceptance is only accepting the proposal. A contract comes into existence when one party makes an offer which the other accepts. A proposal or acceptance may be express or implied and these elements should be present in every contract.

UNIT OBJECTIVES

- ❖ To understand the meaning and legal rules as to offer and acceptance.
- ❖ To learn about the various kinds of offer and acceptance
- ❖ To analyse the distinction between an offer and invitation to an offer.
- ❖ To study about the communication and Revocation of offer and acceptance.
- ❖ To know the various modes for termination of offer.

UNIT STRUCTURE

2.1 Offer or proposal
2.2 Offer and Invitation to offer
2.3 Acceptance
2.4 Communication and Revocation of offer and acceptance.
2.5 Termination of offer
2.6 Warranty, condition, Fundamental obligation, Ticket Cases.
2.7 Summary
2.8 Key Words
2.9 Answers to check your progress
2.10 Exercise questions

2.1 OFFER OR PROPOSAL:-

An offer is a proposal by one party to another to enter into a legally binding agreement with him. Literally, it means 'expression of willingness'. The proposal is the starting point to a contract. For Example :- 'A' says to 'B' "will you purchase my plot for Rs.2 lakhs? It is an offer. Here 'A' signifies his intention to do a

particular act. In this case, if 'B' says to 'A' "I agree to purchase your plot for Rs. 2 lakhs. It is called an acceptance.

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section 2 (a) of the Indian contract Act, defines, "A person is said to make a proposal, when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence".

In this definition you must note some important points. According to this definition, willingness to do or to abstain from doing anything will amount to an offer. Let us clarify these two points by illustrations.

1. A says to B " I will sell my car to you for Rs. 50,000. In this illustration, A expresses his willingness to do a particular act. i.e., A's willingness to sell his car to B for Rs.25,000. Here A signifies his willingness to B for selling his car at Rs.25,000 with a view to obtain the assent of B. It is called an offer.

2. A and B are the owners of adjacent lands. A has a vacant site only, whereas B, the adjoining owner, has a building adjacent to the vacant site of A. A says to B "I will not put up any construction on my vacant site so as to prevent air and light to your building provided you pay me Rs. 50000. Here, A signifies his willingness to B not to do a particular act in order to obtain the assent of B. It is also called an offer.

The person who makes the proposal is called the promisor and 'Offeror'. The person to whom it is made is called the 'Proposee' or 'Offeree'. In the terminology of section 2(c) "The person making the proposal is called the 'Promisor' and the person accepting the proposal is called the 'promisee'.

Thus, in view of the above definition, a proposal is in the first place, an expression of the offeror's willingness to do or abstain from doing something. Secondly, it should be made with a view to obtaining the assent of the offeree to the proposed act or abstinence.

2.1.1. KINDS OF OFFER :-

(i) Express and implied offer

a) Express offer

An offer may be either express or implied one. when an offer is made either by express words spoken or written, it is known as an express offer. For Example :- 'A' says to 'B' will you purchase my bike for Rs.10000/- This is an express offer made by spoken words.

b) Implied offer

An offer may also be implied from the conduct of the parties or the circumstances of the case. This is called as an implied offer. For Example :-

Check Your Progress Questions

1. Define offer,
2. What is general and specific offer?

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When a person gets into a bus for going from one place to another, it is an implied offer. Here, he undertakes to pay the bus fare eventhough he makes no express promise to do so. Likewise, consuming eatables in a self - Service restaurant implies an offer to pay the price of it. Install a weighing machine in a public place is also implies an offer.

(ii) General and specific offer:

An offer may be general or specific one.

a) Specific offer: An offer is said to be specific, when it is addressed to a definite individual or a body of individuals, with an intention of entering into a contract only with that particular person. It can be accepted by that particular person. 'Salmond' calls specific offers as "offers to individuals".

For example: 'A' offers to 'B' will you purchase my car for Rs.2 lakhs? It is a specific offer made to a definite person.

(b) General ofter:

When an offer is made to the world at large (i.e.) to the public, it is called as general offer. An offer is said to be general when it is made to an ascertained individual. An offer need not be made to an ascertained person. A public advertisement in news paper for a reward is the usual form of general offer. Salmond calls general offer as "offers at large"

Example:

'A' makes an offer in a newspaper to pay Rs.5000/- to anybody who will bring back his lost dog. This is a general offer. This offer is not addressed to anybody in particular, though it is deemed to have been accepted by that individual who brings the dog back and can claim the reward.

It was suggested in the old case of **Weeks Vs. Tybald** that an offer must be made to a definite person. In this case, the defandant in the course of a casual conversation said that he would give 100 pounds to any one marrying his daughter with his consent. The plaintiff married his daughter with his consent and sued for that amount. It was held that such general words spoken could not be taken as seriously intended to make a contract. But, this rule was overruled. Now, the modern position is that an offer may be made to world at large and need not be made to an ascertained person. the person who fulfills the condition contained in the general offer must be regarded as accepting the offer and having a concluded contract in his favour.

This principle is thus stated by Anson, **"An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person."**

An offer of this kind has already been discussed in the case of **Lalman Vs. Gauri Dutt (1913)** which was addressed to the public.

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The leading case on general offer is **Carlill Vs. Carbolic Smoke Ball co. (1893, 1QB 256),** In this case, the defendant company advertised in several newspaper about their anti-influenza medical preparation called "Carbolic Smoke Ball". In the advertisement, it announced a reward of 100 pounds would be given to any person who was affected by Influenza even after using the smoke ball medicine according to their printed instructions for two weeks. On the faith of this advertisement, the plaintiff, Mrs. Carlill used the medicine according to the directions of the company but she was still affected by influenza. So, she sued for the reward.

It was contended that an offer to a public was only an invitation to offer and it was not valid. It was held that the plaintiff could recover the amount as by using the smoke balls she had accepted the offer. So, it is clear from this case that in the cases of general offer, "the performance of the conditions prescribed by theoffer is the acceptance" and creates a contract. In general offer, if it is specifically stated that the acceptance must be communicated then the offeree must communicate his acceptance.

The decision in carbolic smoke ball case has also been followed in India in the cases of general offers.

In **Bhajan Lal Vs. Charan Lal AIR 1925 All 539,** the defendant made an advertisement by issuing a pamphlet offering to pay Rs.500/- to anyone who traced out his missing son. the plaintiff traced the boy and filed a suit claiming that amount. It was held that the plaintiff was entitled to claim the reward amount.

(iii) Cross offer:

When two parties make, identical (or) similar offer simultaneously to each other, in ignorance to each other's offer, (i.e) without knowing the offer make by one to another, such offers are called as cross offer. In such cases, the court will not construe one offer as the offer and the another as the acceptance.

Cross offers do not constitute an acceptance of one's offer by the other, because acceptance of an offer can be made only after knowing the offer. But, in cross offers each one is making an offer without knowing the other's offer. Thus, cross-offers do not give rise to a binding contract betweenthe parties.

For example: 'A' makes an offer by a letter to B to sell his house for Rs.5 lakhs. Before this letter reaches the hands of B and without knowing this letter, 'B' also makes a similar offer to purchase A's house for Rs.5 lakhs. Here both offers are cross offer. In **Tinn Vs. Hoffmann** & Co. (1873), the defendant to the

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plaintiff offering to sell a certain quantity of lion at a particular price. The sameday, the plaintiff wrote a letter to the defendant from offering to buy the same quantity of iron at the same price.

(iv) Counter offer:

A counter offer is a rejection of the original offer and making a new offer. This new offer is called as counter offer. According to se.7 of the contract Act, in order to convert a proposal into a promise, the acceptance must be absolute nd unqualified. After receiving the offer, if the offeree instead of accepting it in total, he expresses his willingness to accept it with some changes in the terms of offer, such act is called as counter offer. In other worlds, if any term of the offer is refused or varied or added by the offeree, his acceptance merely operates as a counter-offer. Then, it cannot be said that there is an agreement between the parties. Counter offer always come only from the offeree. Once a counter offer is made, then the original offer cannot be accepted by the offeree it amounts to rejection of the original offer and creates a new offer.

2.2 OFFER AND INVITATION OF OFFER

An offer is different from an invitation to offer. Every expression of willingness to enter into a contract may not amount to an offer in the legal sense. It may be only a preliminary step in the formation of a contract. Thus, it is necessary to distinguish betwee 'offer' and an invitation to offer. In certain cases, it is very difficult to differentiate which part of the trnasaction is an invitation to offer and which one is an offer.

An offer is capable of conversion into a contract by acceptance. An invitation to offer is an attempt to induce offers and precedes a definite offer. By accepting it a contract does not result and only an offer emerges in the process of negotiation and it will not create any legal obligation. Invitation to treat, quotations Action sale, catalogues, price-list, Railway Timetables, Tenders are the instances for invitation to offer. The invitation to offer is otherwise called as offers to receive' or offers to negotiate or offers to chaffer.

An offer contains the offeror's willingness to do or abstain from doing something, made with a view to obtain the assent of the offeree. But, in the case of invitation to offer, this kind of willingness will be absent and it only invites a party to make an offer.

In other words, an invitation to offer usually contains certain terms on which a person express his willingness to negotiate and it only invites the other party to make an offer on those terms.

Illustration:

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1. A shopkeeper displays goods in a shop window or even puts them out on shelves in a self service store. It is to be construed as an invitation to offer and not as an offer to sell.

2. Offen merely an invitation to offer. the distinction between an offer and invitation to offer would b clear from the following illustrations through case laws.

If an advertisement is made by a company that it has a stock of books to sell or houses to let, there is no offer to be bound by any contract. Such advertisements are only offers to negotiate or offers to receive an offer.

In **Pharmaceutical society Vs. Books cash chemists (1953, 1, Q.B.401),** when a customer picks up an article in a 'self service store' and takes it to the cashier's desk to pay for it, It was held that, his action cannot be said to be an acceptance of an offer to sell, it is only an invitation to an offer to buy the articles which the shopkeeper may or may not accept.

In **Gibson Vs. Manchester city Council (1979, 1 ALL, ER 972), In September 1970** the council adopted a pdicy of selling council houses to council tenants. In February 1971, the City Council Treasurer wrote a letter to Gibson stating that the council "may be prepared to sell the house to you at 2180 pounds". Gibson sent an application for allotment of the house. Meanwhile, in the month of May, 1972, the control of the council changed and thereby the city council changed its policy of selling council houses and refused to complete the transaction. Gibson claimed that a binding contract had come into existence.

The House of Lords held that the letter of the treasurer was only an invitation to receive an offer and that Gibson's application was itself an offer The claim was dismissed since there was no contract.

The distinction between offer and invitation to treat was clearly explained in an important case **Fisher Vs. Bell** (1960), In this case, a shop keeper (i.e) the respondent exhibited in a show window of his shop a flick knife with a marked price. So he was convicted for offering for sale of a flick knife contrary to the Restriction of offensive weapons Act, 1959. The court held that, it was no sense an offer for sale the acceptance of which constitutes a contract. The display of an article with a price on it in a shop window is merely an invitation to treat.

a) Quotations:

Quotation of prices is only an invitation to offer and not an offer. In **Harvey Vs. Facey (1893, A.C. 552),** Harvey telegraphed to Facey, writing will you sell us Bumper Hall penn? Telegraph the lowest cash price, Facey telegraphed,

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in reply, "Lowest price for Bumper Hall penn 900 Pounds". Then Harvey telegraphed that, "we agree to buy Bumper Hall penn for 900 pounds asked by you please send us your title deeds". But, Facey refused to sell the plot of land at that lowest minimum price. So, the plaintiff Harvey filed a suit. The privy Council held that there was only a bare statement of the minimum price (quotation) and that there was no contract.

The principle of this case has been followed by supreme court in **Macpherson Vs. Appana AIR 1951 SC 184,** the plaintiff offered to purchase a lodge owned by the defendant for Rs.6000. He wrote the defendant's agene asking whether his offer had been accepted and saying that he was prepared to accept any higher price it found reasonable. The agent replied. "wont accept less than Rs.10,000/-. The plaintiff accepted the price. But, the defendant sold the property to another for a higher price. So, the plaintiff filed a suit for specific performance.

It was held that the defendant did not make any offer but was merely inviting offers. A mere statement of the lowest price contains no offer to sell at that price to the party making the inquiry and therefere the suit was dismissed as there was no concluded contract.

b) Tender (or) standing offer:

Notices of tenders in newspapers by Govt. or other bodies for purchase of sale of goods are not offers but are only invitations for offers. In such cases the person who sends a tender for the supply of goods is the offeror and his offer may or may not be accepted by the party inviting the tenders. an acceptance of such a tender merely amounts to an intimation that the offer will be considered to remain open during the period specified. It is otherwise called as 'standing offer' A contract results only when a specific offer is placed for supply a definite of goods it will be accepted from time to time by orders for specific quantities and does not bind either party unless and until such orders are given and there is no obligation on the party accepting the tender to place any order.

In **Spencer Vs. Harding (1870)** the defendant sent out a circular calling for tenders from intending purchasers of certain stock-in, trade. The plaintiffs tender was the highest, but the defendant failed to sell the stock to him. So, the plaintiff filed a suit for damages. It was held that the circular was only an invitation to offer and that the tender was the real offer. So, the suit was dismissed since there was no concluded contract in this case.

In **R. Vs. Demers (1900, A.C. 103),** a tender for printing and binding certain official publications for a period of 8 years was accepted. But owing to charges in the government, no orders were placed with Demers. So, he claimed

damages. It was held that there was no obligation to pay for work not entrusted with the plaintiff and the mere acceptance of the tender did not throw any liability on the govt to give the plaintiff all or any of the printing referred to in the tender.

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In the case of a standing offer, once an order is placed, a contract comes into existence. A standing offer may be revoked at any time before the order is placed.

In **Union of India Vs. Maddala Thathia, AIR (1966 SC, 1724)** the Government of India invited tenders for the supply of jaggery. The plaintiff's tender was accepted and he agreed to supply upto 14,000 maunds of jaggery during February and March, 1948. An order was placed for 3500 maunds on February and for 3500 maunds on 1st March 1948. But, these orders were cancelled in March itself. The plaintiff sued for damages for breach of contract. The supreme court held that the tender was a standing offer. By placing orders, a concluded contract emerged and the cancellation of the orders was a breach of contract, and therefore the plaintiff was entitled to claim damages.

When tenders are invited by the Govt, the completion of the contract takes place only in strict confirmity with the conditions subject to which the tenders are called for.

In **State of Madhya Pradesh Vs. Firm Govardhan Dass**, AIR, 1973 (SC) 1164, the Government wanted to sell lac and certain lac products and invited tenders. Theconditions stipulated that sanction on behalf of the Government was to be accorded by the chief conservtor of Forests. Further, according to the rules framed under the Forest Act, the contract was to be in writing. The firm which submitted the highest tender did not make the initial deposit of 25% of the price and so the Government re-sold the stock and sued the defaulting firm for the deficiency on re-sale. The suit was held to be not maintenable as there was no concluded contract. The contract was incomplete because there was no proof of sanction by the chief conservator of Forests.

c) Auction Sales:

The same principle goerns the case of auction sales also, An announcement of an auction sales also, An announcement of an auction is only an invitation to offer and a bid made at the auction constitutes the offer. In auction sales, the acceptance is signified by the fall of the hammer, but the offer can be revoked before such acceptance.

In the case of **Harris Vs. Nickerson (1873)** 8, QB, 286, it was held that an advertisement that certain goods would be sold in an auction at a specified

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time was not an offer to potential bidders to held the sale. It was only an invitation to offer and the auction may be cancelled. so, the plaintiff was not entitled to recover damages for loss suffered by travelling to the advertised place of an auction sale which was finally cancelled.

d) Railway Time Tables:

The Railways publish time tables. They are only an invitation to offer and not an offer. At one time, it was thought that a railway company by issuing a timetable was making an offer.

In **Denton Vs. Great Northern Railway (1856),** the defendant company issued a time. Table which notified one train as running from peterborough to Hull at a specified time. After the time table had been printed but before its publication the train was withdrawn from service. The plaintiff relied on this time table. He went to peterborough station and demanded a ticket to Hull but he was informed that the service had been withdrawn. So, he filed a suit for damages. The court awarded damages in tort to the plaintiff only on the basis of a false representation (i.e) fraud by the Railway company. However, justice. Cromton rejected the claim based on contract. He treated the time table merely as an invitation to offer.

Now, the modern view is to regard the tendering of the price of ticket as the offer and the isuing of ticket as an acceptance. However, now a days railway timetables usually contain provisos exempting the liability of the railway in such circumstances.

e) Price catalogue:

A shopkeeper's catalogue of prices is not an offer it is only an invitation to offer to the intending customers to buy the articles at the indicated prices As already stated, the display of goods in a shop with price tags attached for sale is not an offer even if there is a self service system in the shop. It is only an invitation to offer.

2.1.2. ESSENTIAL ELEMENTS OF A VALID OFFER

1. Terms of the offer must be definite and certain:

1. An offer must contain terms which are definite or capable of being made definite. If the terms of an offer are vague or indefinite or ambiguous, it's acceptance cannot create any contractual relationship. For example, if 'A' says to 'B' I will pay you some money if you sell your house to me "this is not an offer because the amount of money to be paid is not certain. Since the terms are not

definite and therefore the offer is not a valid offer. In the same example, if A says to B," I will pay you Rs.50000 if you sell your house to me" then the terms of the offer are definite. Because A has stated definitely that he will pay Rs.50000 if B agrees to sell his house to him. This is a valid offer.

Taylor Vs. Portington, [1855] This case has already been discussed earlier. It is an authority to the rule that agreements the meaning of which are not certain or capable of being made certain are void.

2. An offer must be one intended to give rise to legal consequences.

Ordinary invitations to social affairs are not offers because there is no intention to create a legal relationship in such matters. For example, an agreement between two persons to go together to a picture does not create a legal obligation as it relates to social matters. The Indian Contract Act does not require that an offer or its acceptance should be made with the intention of creating legal relations. But according to English Law, to create a contract there must be a common intention of the parties to enter into legal obligations. Contracts must not be the mere matters of pleasantry never intended by the parties to have any serious effect whatsoever. It is not every lose conversion that is to be turned into a contract though the parties have agreed.

Let us see another example, A invited B to his house for a dinner on a particular day. But, A forgot all about the dinner, and B when arrived at A's house. A was not there and there was no dinner to B cannot sue A because this agreement did not give rise to legally binding agreement and B cannot claim any compensation for inconvenience and expenses.

Balfour Vs. Balfour : (1919) 2.KB 571) A husband promised to send certain amount per month to his wife so long as she remained away from him. Held, that the wife cannot sue for that amount because the promise made by the husband was never intended to give rise to legal consequences.

When an agreement clearly provided that it shall not be subject to legal jurisdiction in the court of law it was held that there was no contract made between the parties. The court must in each case find out whether the parties have intended to enter into legal obligations. The intention of the parties is known from the terms of the contract and the surrounding circumstances. So in the cases of ordinary domestic or social arrangements it will be presumed that the parties have no such intention, even though there may have been an exchange of mutual promises and a consideration moving from the promises.

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3. An offer must be distinguished from a quotation or an invitation to offer or chaffer (to bargain).

An offer must be distinguished from an invitation to make an offer. Display of goods by a shopkeeper in his window with prices marked on them is not an offer but merely an invitation to the public to make an offer to buy the goods at the market price. Therefore quotations, catlogues, Tenders and advertisements etc are not constitute an offer. For example, if A asks B" Do you want to buy my cycle ", he is not making an offer but is inviting an offer from B. If B says to A" I will pay you Rs.200 for your cycle" here B only makes an offer to A, to purchase A's cycle for Rs.200.

Harvey Vs. Facey : (1893) A.C.552) 'X' telegraphed to 'A' "Will you sell us Bumper Hall Pen? Telegraph lowest cash price". 'A' replied by telegram, "Lowest cash price of B.H.Pen is 900 Pounds". 'X' telegraphed "we agree to buy B.H.Pen for 900 Pounds asked by you".

In a suit by 'X' against 'A', the court held that, 'the mere statement of the lowest price at which the vendor would sell his estate B.H.Pen contained no implied offer to sell at that price and there was not reply to the question whether A agreed to sell the property. It was therefore held that there was no concluded contract between the parties.

4. **Every offer must be communicated to the offeree :** Since a contract requires identity of minds unless the offeree is aware of the offer there can be no acceptance, much less a contract. An offer, to be complete, must be communicated to the person to whom it is made. Unless the offer is communicated, there can be no acceptance of it.

In the important case of **Lalman Vs.Gouri Dutt, [1913]** a master sent his servant Lalman, to trace his nephew. He then announced in an advertisement that any body who traced his nephew would be entitled to certain reward amount. Lalman traced the boy in ignorance of the announcement. Subsequently, when he came to know of the reward, he claimed it. But the defendant refused to pay the reward, In this case, it was held that he was not entitled to the reward, because when the offer was not communicated to the offeree, there can be no acceptance to an offer.

5. Offer must be made with a view to obtaining the assent of the other party:

An offer must be distinguished from mere expression of intention. the offer to do or not to do something must be made with a view to obtaining the assent of the other party and not merely with a view to disclosing the intention of making an offer.

6. Offer should not contain a term, the non-compliance of which will be assumed as acceptance:

The offeror cannot say that if the acceptance is not communicated before certain time, the offer will be presumed or treated as accepted.

For example: 'A' writes a letter to 'B', "I will sell my horse for Rs.5000 to you and if you do not reply within a week from the date of receipt of this letter, I shall assume that you have accepted my offer". Here there is no contract even if 'B' does not reply.

7. An offer may be conditional:

An offer can be made subject to a condition. A conditional offer lapses when the condition is not accepted. Where a condition attached to an offer is against public policy, it will not be enforced merely because it had been impliedly accepted by the offeree.

8. A mere statement of price can not be considered as an offer to sell.

2.3 ACCEPTANCE

Acceptance means the assent or consent given to the offer by the offeree.

Sec2(b) of the contract Act defines acceptance thus: "when the person to whom the proposal is made signifies his assent there to the proposal is said to be accepted. A proposal when accepted becomes a promise".

A contract emerges from the acceptance of an offer. Sir William Anson says **"An acceptance to an offer is what a lighted match is to a train of gun powder"**, that an offer once accepted explodes or ripens into a contract. the offeree when he accepts the offer is called an acceptor.

Acceptance is the manifestation by the offeree of his assent to the terms of the offer. Acceptance must be unconditional, and without any variance of any sort between it and proposal; and one must accept just what is offered. An acceptance may be made by saying yes, ok or by a mere affirmative nod of the head. No particular from of words and mode of expression is required for acceptance. Any expression of an intention to agree is sufficient. An offer may be accdepted only by the person to whom it is made. If a third party attempted to accept it no contract with that person arises. If the offer is not to a specific individual but to the public at large, it may be accepted by any member of the public at large who has knoledge of the offer. (Carlill Vs. Carbolic smoke ball company case.

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Check Your Progress Questions

3. What is acceptance?

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Effect of Acceptance:

Once an affer is accepted, an agreement or a promise arrises between the offerer and offeree. For Example: A offeres to sell his plot to B for Rs.3 Lakhs. B accepts the offer to purchase the house. This is an acceptance here A's offer is said to be accepted an agreement between A and B for sale arises.

2.2.1. KINDS OF ACCEPTANCE

An acceptance may be express or implied

1. Express Acceptance: When the acceptance is made by words, it is called express acceptance. Express acceptance may be further divided into the following two types depending upon the usage of the words.

(i) Written acceptance: Acceptance made by writeen words is called as written acceptance.

(ii) Oral Acceptance: Acceptance made by spoken words is called as oral acceptance.

2. Implied acceptance: When an acceptance is derived from the circumstances (or) conduct of the parties it is called as implied acceptance. In the case of implied acceptance there may not be any usage of words for accepting the offer but, it is made by conduct.

For example: 1. A bus driver offers to carry passengers from chennai to Madurai for Rs.250/- X gets into the bus and travels. This conduct of X is an implied acceptance of the offer.

2. At an auction sale, X is the highest bidder. The auctioneer accepts the offer by striking the hammer on the table. This is an implied acceptance.

2.2.2.ESSENTIAL ELEMENTS OF A VALID ACCEPTANCE: (Legal Rules as to acceptance)

The acceptance of an offer is verty essential to a contract. Once a valid acceptance is made, it converts the offer into a binding promise or agreement. An acceptance is valid and legally effective only of the following coditions are satisfied.

1. Acceptance must be absolute and unconditional:

The first and foremost essential of a valid acceptance is that it must be absolute and unconditional and should correspond with the terms of the offer. According to section 7(1) an acceptance in order to be binding, must be absolute and unconditonal inrespect of all the terms of the offer. If the parties or not ad idem on all matters concerning the offer and acceptance, there is no contract.

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Examples: (a) A made an offer to B to purchase a house with possession from 25th July. The offer was followed by an acceptance suggesting possession from 1st August. It was held that there was no concluded contract. **(Routledge Vs. Grant, (1828).** (b) In the case of **Neale Vs. Merret, (1930)** M offered to sell a peace of land to N at 280 pounds. N accepted and enclosed 80 pounds with a promise to pay the balance by monthly insalments of 50 pounds each it was held that there was no contract between M and N, as the acceptance was not unqualified.

Any variation or alteration is made in a terms of the affer by the offeree will make the acceptance invalid. For example A offeres to sell house to B for Rs.50000, B accepts to purchase house for Rs.20000/-. Conditional acceptance is not valid and it will amount to a counter offer. If B accepts to purchase the house for Rs.50000/-as accepted then the acceptance is a valid one.

2. Acceptance must be made by the offeree:

In the case of specific offer, it must be accepted only by that particular person or his duly authorised agent. In the case of general offer it can be accepted by any one of the general public. If the general offer is on continuing nature (like Carbalic smoke ball co,. case) then any number of persons can accept the offer until it is revoked and independant contracts will arise between all those who have accepted the general offer. If the general offer is only to do a particular act, like tracing of a missing boy, any number of persons can come forward for accepting the offer, but a valid contract would arise only with that particular person who traced the boy and he alone will be treated as the person who has accepted the offer.

3. Acceptance must be communicated to the offeror:

An acceptance is valid only if it is communicated to the offeror. If the offeree remains silent and does nothing to show that he has accepted the offer, no contract is formed. The acceptor should do something to signify his intension to accept. Moreover, a communication of acceptance is sent to any other person i.e other than the offeror, can not be treated as a valid acceptance.

A mere resolve or mental determination on the part of the offeree to accept an offer, when there is no external manifestation of the intention to do so, is not sufficient

In the case of **Felthouse Vs. Bindley, (1862),** F offered to buy his nephew's horse for 30 pounds saying: "If I hear no more about it I shall consider the horse is mine at 30 pounds". The nephew did not wirte to F at all, but he told his

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auctioneer who was selling his horses not to sell that particular horse because it had been sold to his uncle. The auctioneer inadvertently sold the horse. Held that F had no right of action against the auctioneer as the horse had not been sold to F, his offer of 30 pounds not having been accepted.

In some cases the offeror may dispense with the communication acceptance. It happens when the performance of certain conditions takes place, or some required act is done (section 8). For example, in **Carlill vs. Carbolic Smoke Ball Co., (1893) 1 Q.B.** Where Carlill used the smoke balls medicine of the company according to its directions and affected by influenza fever, it amounted to acceptance of the offer by doing the required act and she could claim the reward.

4. Acceptance must be made only after the knowledge of the offer:

Ac acceptance is valid only if it is made after the knowledge of the offer. An acceptance made without the knowledge of the terms of the offer is not a valid acceptance.

In **Lalman Shukla Vs. Gauri Dutt 1913 All LJ. 484),** the master asked his servant to search for his missing nephew. Subsequently the master announced a reward to the general public for tracing the missing boy. The servant who has already in the mission of searching the boy never knew the offer of reward. The servant traced out the boy and he came to know about the reward and claimed the reward. But the court dismissed his claim on the ground that there was no valid acceptance because he had no knowledge of the offer either before or at the time of acceptance.

5.Acceptance must be communicated according to the precribed mode or usual and reasonable manner:

The acceptance must be communicated in the manner prescribed by the offeror. Acceptance made by any other manner may not be treated as valid. For example if the offeror specifies that the acceptance must be in writing, an oral acceptance is not valid.

If the acceptance is not according to the mode prescribed, or some usual and reasonable mode (where no mode is prescribed) the offeror may intimate to the offeree within a reasonable time that the acceptance is not according to the mode prescribed and may insist that the offer must be accepted in the prescribed mode only. If he does not inform the offeree, he is deemed to have accepted the acceptance (Section 7(2)).

For example: A makes an offer to B and says: "If you accept the offer, reply by wire". B sends the reply by post. It will be a valid acceptance unless A informs B that the acceptance is not according to the prescribed mode.

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6. Acceptance must be made with a reasonable time

If any time limit is specified, the acceptance must by given within that time. If no time limit is specified, it must be givenwithin a reasonable time.

In the case of **Ramsgate Victoria Hotel Co. Vs. Montefiore, (1886),** On 8th June M offered to take shares in R company. He received a letter of acceptance on November 23. He refused to take the shares. Held that , M was entitled to refuse as his offer had lapsed as the reasonable period during which it could be accepted had elapsed.

7. Acceptance should be made before the offer lapses or is revoked or rejected:

Once an acceptance is made the offer becomes irrevocable. For example, if A says to B, I will sell my cycle to you for Rs.200, and B says to A" I reject your proposal". Later on, it is not possible for B to accept the proposal. Acceptance should be made before an offer is rejected.

8. Acceptance can not precede an offer:

If the acceptance precedes an offer, it is not a valid acceptance and does not resuld in a contract. For example. In a company, shares were allotted to a person who had not applied for them. subsequently when he applied for shares,he was unaware of the previous allotment. The allotment of shares previous to the application is invalid.

9. Acceptance cannot be implied from silence:

The acceptance of an offer cannot be implied from the silence of the offeree or his failure to answer, unless the offeree has by his previous conduct indicated that his silence means that the accepts.

For example: A wrote to B, "I offer you my car for Rs.10,000/-. If I don't hear from you in seven days, I shall assume that you accept". B did not reply at all. There is no contract.

2.2.3.SILENCE NOT TO BE ACCEPTANCE:

As a general rule, offeree's silence cannot be treated as an acceptance of the offer. The offeror has every right to prescribe the manner in which the offer must be accepted. But he cannot prescribe a condition in the offer that the offeree's silence will be treated as acceptance of the offer. Such a condition in

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the offer will invalidate the offer itself. (Silence means keeping quite without sending any reply). The leading case and the point is **Brogden Vs. Metropolitan Railway Company**: A person received an offer by letter. He simply wrote on it "accepted", put the letter in his drawer, when he sued on the strength of the proposal, it was held that in as much as his approval or acceptance was not communicated there was no contract at all.

In certain cases the offeree's silence will be presumed as acceptance it happen in the following cases

(a) where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation;

(b) where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent or inactive intends to accept the offer;

(c) where, because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept."

For example, A subscribes to 'Hindu' newspaper for one year, After the expiry of the one year period, the news paper company continued to send the paper by post for another three months. A simply accepted the paper and kept silent without sending any communication to stop sending the paper because his subscription period is over. Here his silence amounts to acceptance and he is liable to pay the charges for the three months.

In **L.I.C. of India Vs. Vasireddy (A.I.R. 1984 S.C.1014)** the Supreme Court considered whether silence or even cashing of the cheque by the L.I.C. without other formalities being completely finalised would amount to the creation of a contract. the deceased had filed a proposal for an insurance of Rs.50,000 on December 27th, 1960. the two cheques given by him for Rs. 300 and Rs.200 as premium were cashed by L.I.C. On 12th January, 1961, the proposer died and the widow claimed the insurance amount. The encashment of the cheques was relied on as acceptance of the proposal. The Corporation argued that the actual premium was yet to be finally calculated. The Supreme Court held that there was no signified acceptance or any other act from which it could be presumed.

Acceptance Subject to contract

When an offer or acceptance is made 'subject to contract' or by the use of words "subject to approval by certain persons such as solicitors etc.," no contract will arise till formal contract is settled or consent of such person is obtained.

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For example: A and B signed an agreement for the purchase of a house by B 'subject a proper contract' to be prepared by A's solicitors. A document was prepared by A's solicitors and approved by B's solicitors, but B refused to sign the document. It was held that there was no contract as the agreement was only conditional **(Chillingworth Vs. Esche, (1924) 1, ch. 97)**

2.4 COMMUNICATION AND REVOCATION OF OFFER AND ACCEPTANCE:

An offer, its acceptance and their revocation should be communicated to the other party to a contract. In section 2(a) and 2(b) you have seen that a promisor has to signify his willingness and a promisee has to signify his assent. Hence, you must know about the modes of communication and revocation of offer and accepténce. When the contracting parties are face to face and when one person makes an offer and the other accepts the offer - absolutely, a contract comes into existence. But where the parties to the contract are at a different places and they enter into contracts only through post, telegram, telephone, the rules contained in sections 3 to 5 apply.

According to section 3 of the contract Act, states as follows. "The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptance respectively are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it".

It means that the offer, acceptance or revocation may be communicated by words or by conduct.

2.4.1 COMMUNICATION OF OFFER OR PROPOSAL:

The process of making a proposal is completed by the act of communicating it to the other party. When an offer is not communicated, it has no legal effects. There can be no acceptance of a proposal unless it is communicated. According to **section 4, para 1,** "the communication of an offer is complete when it comes to the knowledge of the person to whom it is made". For example : 'A' proposes by a letter to sell a house to 'B' at a certain price. The letter is posted on 9th June. It reaches 'B' on 11th June. Here, the communication of offer is complete when 'B' receives the letter. (i.e.) on 11th June. Therefore, an offer cannot take effect to create a binding contract unless and until it has been brought to the knowledge of the person to whom it is made.

In an american case, **Fitch vs. Snedaker [1868]**, the court held that a reward could not be claimed bv one who did not know that it had been offered.

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The same rule has been followed in India. In **Lalman vs. Gauri Dutt [1913, 11 ALL L.J.]** the defendant sent his servant (i.e) the plaintiff to search his missing nephew. Later on, he announced a reward for information relating to his nephew. The plaintiff, in ignorance of the announcement, traced the boy. In this case, he claimed that reward amount. It was held that the plaintiff was not entitled to the reward amount since the offer was not communicated to him and he traced the boy in ignorance of the announcement and subsequently when he came to know of the reward he claimed it.

2.4.2. COMMUNICATION OF ACCEPTANCE

Acceptance also should be communicated to the offeror in order to conclude a contract between the parties. Acceptance is not complete unless and until it is communicated to the offeror.

According to section 4, para 2, communication of an acceptance is complete a) as against the proposer when it is put in course of transmission to him so as to be out of the power of the acceptor to withdraw the same. (b) as against the acceptor when it comes to the knowledge of the proposer.

For example : 'A' proposes by a letter to sell a house to 'B' at a certain price. 'B' accepts A's proposal by letter sent by post, on 5th July. The letter reaches 'A' on 7th July. The communication of an acceptance is completed, as against 'A' when the letter is posted (i.e) on 5th July, as against 'B' when the letter is received by 'A' (ie) on 7th July.

Where an offer takes the form of a promise to pay money in return for an act, the performance of that act will usually be deemed an adequate indication of assent. (Carlill Vs. Carbolic Smoke ball co.) For example : If an offer of reward is made to find out a lost dog, the offer is accepted by finding the dog. It is unnecessary before beginning to search for the dog to give notice of acceptance of the offer.

Acceptance through the post :

According to English law, once the letter of acceptance is posted, the contract comes into existence and it cannot be revoked. But under Indian Law, when the communication of an acceptance is made by post, it is complete as against the proposer when the letter of acceptance is posted and as against the acceptor, when the letter is received by him. Where a letter of acceptance was duly posted but was delayed in post and the offeror sought to repudiate the contract, it was held that the posting of the letter was an acceptance of the offer.

Check Your Progress Questions

4. When does communication of revocation complete?

The leading case on the point is **Dunlop Vs. Higgins (1848),** In this case, Dunlop & Co. offered by post to sell a certain quantity of iron at a particular price. The offer sent on 28.1.1847 reached Higgins on the 30th day. On the sameday, a letter of acceptance was posted. Because of some delay, the letter reached the defendant only on 15th February. As prices had gone up, the defendant refused to supply the goods. It was held that the letter of acceptance was duly posted at the proper time and that the acceptor was not responsible for any delay in the course of transit to contract by post.

It is applicable to contract by telegraph also.

Contract over Telephone :

A contract by telephone has the same effect as an oral agreement entered into between the parties when they are face to face. Offer and acceptance can be communicated through the telephone both under Indian law and English law. But the offeree must make sure that his acceptance is properly received. (ie.) heard and understood by the offeror. **[Kanhaiyalal Vs. Dineshwara Chandra (1959)]**.

In **Bhagavandas Govardhandas Vs. Girdharlal,** the Supreme Court held that a contract entered into over the telephone becomes complete when it comes to the knowledge of the proposer.

2.4.3 REVOCATION OF OFFER AND ACCEPTANCE

Revocation means "taking back" or 'recalling' or 'withdrawal'. A revocation may relate to a proposal or to an acceptance.

Communication of revocation (Sec.4, Para 3)

The communication of a revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

As offer can be rovoked before acceptance and an acceptance can be revoked before its communication.

Examples: (a) 'A' proposes, by a letter, to sell a house to B at a certain price. The letter is posted on 15th May. It reaches B on 19th May. 'A' revokes his offer by telegram on 18th May. The telegram reaches to 'B' on 20th May. The revocation is complete as against 'A' when the telegram is despatched, (i.e.), on 18th May. It is complete as against B when he receives it, i.e., on 20th.

(b) 'A' offered, by a letter of October 1, to sell goods to B in Newyork. B received the offer on 11th and immediately telegraphed his acceptance. On

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18th, 'A' wrote a letter revoking his offer. The letter was received by B on 20th. Held, that the revocation was of no effect until it reached B. A contract was made on 11th October when B accepted the offer (**Byme & Co. Vs. Van Tienhoven, (1880) 5 C.P.D. 344**).

Lindley J. observed in this case, "A state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all."

(a) Revocation of Offer or Proposal :

An offer may be revoked at any time before it is accepted (i.e) the revocation of a proposal may be made at any time before the communication of the acceptance is completed as against the proposer and not afterwards. The communication of acceptance sent by post is complete as against the proposer when the letter of acceptance is posted. so the proposal can be revoked before the letter of acceptance is posted. The notice of revocation should be communicated to the party to whom the proposal was made. Mere posting is not sufficient. There is no difference between the English law and the Indian Law on this point.

Section 5 of the contract Act defines, revocation of proposal and acceptance. According to sec.5, para 1, "A proposal may be revoked at any time before the communication of it's acceptance is complete as against the proposer, but not afterwards.

"An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor of but not afterwards.(sec. 5 para 2).

(b) Revocation of Acceptance :

Section 5 of the contract Act provides that "acceptance can be revoked at any time before the acceptance comes to the knowledge of proposer (offeror) but not afterwards. For Example: 'X' proposes, by a letter sent by post, to sell his car at Rs.2,00,000 to 'B'. 'B' accepts the proposal by a letter sent by post. 'A' may revoke his proposal at any time before or at the moment when 'B' posts his letter of acceptance, but not afterwards.

Likewise 'B' may revoke his acceptance at any time before or at the moment when the letter of acceptance reaches 'A', but not affterwards.

In English law, an acceptance is irrevocable once it is put in the course of communication to the offeror. (i.e.) an acceptance once complete cannot be

revoked. A contract concluded by correspondence become complete as soon as the letter of acceptance it posted.

In the above example, according to English law, 'B' could not have revoked the acceptance once he has posted the letter of acceptance. In India, the acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor only (i.e) when it comes to the knowledge of proposer (offeror).

Sir William Anson says, "Acceptance to an offer is, what a lighted match is to a train of gun powder". It produces something which cannot be recalled or undone".

A peculiar feature of acceptance under English law is that once the letter of acceptance is posted, a binding contract would arise and the offeree has no right to revoke the acceptance. 'Anson' compares an offer with a train of gun powder and acceptance with a lighted match. As soon as a lighted match is brought near the gunpowder, it explodes similarly, an offer when accepted becomes an agreement. Just as, the ignition caused by the match stick cannot save the train of gun powder from blowing up, an offer, which has been accepted cannot be prevented from taking effect. On the other hand the explosion can be prevented if gun powder is removed, before the lighted match is brought near to it. Similarly, no contract arises if the offer is revoked before it is accepted.

Thus, under English law the posting of letter of acceptance concludes the contract and is regarded as sufficient communication to the offeror even if the letter is delayed or lost.

2.5 TERMINATION OF OFFER

An acceptance should be made before the offer lapses. Section 5 of the contract Act provides that " a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwords. so, an offer may lapse for want of acceptance or be revoked before acceptance. Until an offer is accepted, it creates no legal rights, and it may be terminated at any time"

A proposal or offer may come to an end in several ways. According to section 6 of the contract Act, An offer or proposal may be terminated in the following circumstances:

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Check Your Progress Questions

5. When does an offer comes to an end?

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(i) By notice of Revocation: (Section 6(1))

The Revocation of the offer should be made before acceptance of the offer and not afterwards. Once an offer is accepted, there is binding contract. E.g. The bidder at an auction may withdraw his bid before it is accepted by the auctioneer who accepts it by any of the customary methods such as fall of the hammer. Offer may be revoked by a communication of a notice of revocation by the offeror to the other party at anytime before its acceptance is complete as against him (Section 6(1)). A notice of revocation to be effective must be communicated to the offeree. An offer made in writing may be revoked by words of mouth and the notice of revocation may not always be express.

In **Offord Vs. Davies (1882),** it was held that the merefact that the defendants guaranteed payment for 12 months would not preclude them from revoting before the expiry of that period.

In **Byme Vs. Van Tienhoven (1880, 42 L.T. 371),** the defendant was an exporter at Cardiff and the plaintiff a New York importer. On 1st October, the defendant posted an offer to sell tin plates to the plaintiff. The plaintiff received this on 11th October and accepted it by cable the same day and by letter posted on 15th October. On 8th October, the defendant withdrew his offer by posting a letter which reached New York on 20th October. The defendant refused to recognise the existence of contract. The plaintiff sued for damages for non-delivery of the goods.

It was held that the revocation in this case was communicated only on the 20th and before that the contract had already been completed by the plaintiff's acceptance.

(ii) By lapse of time (Section 6(2))

An offer does not remain open indefinitely although the offeror fails to withdraw it. When the proposer prescribes a period withing which the offer must be accepted, the proposal lapses at the end of that period. If the proposer has not prescribed any period; the offer lapses after reasonable time. What is reasonable time will depend on the circumstances of the case.

Example:

A offered to sell his car to B and gave him four days to accept the offer. B had not accepted the offer within four days. The offer lapses after the end of the fourth day. **Head Vs. Diggon:** A seller on Thursday offered wool to a buyer, and gave him three days time to accept. The buyer accepted the offer on Monday but the seller after waiting for three days had sold the wool. Here, the offer had lapsed by its express terms and the seller was not bound.

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Ramsgate Victoria Hotel Co, Vs. Montefiere: Montefiere applied for shares in June, but the allotment was not made till November. Held, the offer to take shares lapsed as reasonable time had passed since the making of the offer, and the defendant was not bound to take shares.

(iii) By non fulfilment of a condition precedent to acceptance (Section 6(3))

If the proposer prescribes any condition precedent to the acceptance of the offer it should be fulfilled and its non-fulfilment operates as a termination of the offer.

For example: A, a seller agrees to sell certain goods subject to the condition that B the buyer, pays the agreed price before the certain date. If be fails to pay the price by that date, the offer stands revoked.

(iv) By death or insanity of the offeror before acceptance: (Section 6(4))

Section 6 is silent as to the effect of the death of the person to whom the offet is made. By death or insanity of the offeror provided the offeree comes to know of it before acceptance. Sec. 6(4). If he accepts an offer in ignorance of the death or insanity of the offeror, the acceptance valid.

In English law, the death of the proposer putsw an end to the offer and an acceptance though in ignorance will not result in contract.

Further, under English law, the insanity of the offeror would render the contract voidable. In India if the fact of insanity is known to the acceptor before acceptance there would be no contract at all.

In addition to the above cases dealt with in section 6, an offer is also revoked,

(v) If a counter offer is made to it

Where an offer is accepted with some modification in the terms of the offer or with some other condition not forming part of the offer, such qualified acceptance amounts to a counter offer and in such cases the original offer will be revoked.

(vi) If an offer is not accepted according to the prescribed mode

If an offer is not accepted according to the prescribed or usual mode, provided the offeror gives notice to the offeree within a reasonable time that the acceptance is not according to the prescribed or usual mode. If the offeror keeps quiet, he is deemed to have accepted the acceptance (Section 7(2)) and the offer will be revoked.

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(vii) If the law is changed

An offer comes to an end if the law is changed so as to make the contract contemplated by the offer illegal or incapable of performance.

2.6. WARRANTY AND CONDITION-FUNDAMENTAL OBLIGATION:

The parties to the contract are at liberty to enter into a contract with any terms as they like. In a contract of sale, the buyer may want to be sure of the quality of the goods and he may express to the seller the purpose for which he is purchasing the goods and buys them depending on the representation of the seller. Such representation may be eigher conditions or warranties. In contract of sale, the parties usually make certain statements or representations to each other before a contract of sale is concluded. a representation or statement will amount to a stipulation or a promise ifthe seller assumes to assert a fact, of which the buyer is ignorant. Whether any statement or representation made by the parties with reference to the goods is a stipulation forming part of the contract or is a mere representation (such as, expression of an opinion) forming no part of the contract depends on the construction of the contract.

A stipulation in a contract of sale made with reference to goods which are the subject matter thereof may be either a condition or warranty. If a stipulation forms the very basis of the contract or is essential to the main purpose of the contract, then it is a condition. It goes to the root of contract. Therefore a condition is a term which is essential to the main purpose of the contract and hence is the foundation of the contract.

If the stipulation though not essential to the main purpose of the contract is collateral to the main purpose of the contract i.e., a subsidiary promise, it is known as a warranty. No particular form of words are required to constitute a condition or warranty. It is not necessary that the word, condition or warranty should be used. It must be a representation which the buyer relies upon and which is understood by the parties as an absolute assertion and not merely the expression of an opinion. All obligations are not of equal importance. It depends on what the parties stipulate for some stipulation are so essential to its very nature that their non-performance may fairly be considered as substantial failure to perform the contract. Some stipulations though they must be performed are not so vital that their failure to perform them does not affect the root or substance of the main purpose of the contract.

In the case of breach of condition, aggrieved party has the right to repudiate the contract and he can also claim damages if any. The aggrieved party can treat

the contract as void. In the case of breach of warranty, it is not possible for the aggrieved party to repudiate the contract but he can claim damages. In the case of breach of condition, the buyer can refuse the goods. If the buyer has already paid money for them he can recover the price. But in the case of breach of warranty the buyer has to accept goods and claim damages for the breach of warranty. For example. If a man buys a particular horse which is warranted quiet to ride and drive but subsequently turns out to be vicious, the stipulation is a condition and the buyer, can reject the horse or keep the horse and claim damages.

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Express and implied conditions and warranties

Conditions and warranties may be express or implies. In the case of express conditions and warranties the parties to the contract express the conditions and wrranties in many words on the basis of the contract. Where there is a contract for the sale of goods by description, this is an implied condition that the goods shall correspond with the description. Implied conditions and warranties are enforced on the ground the law presumes that the parties have incorporated them into their contract though they have not put them into express words.

We have already seen that in the case of breach of warranty as well as, in the case of breach of condition the aggrieved party can claim damages. Let us study this with the help of some case laws.

Ward Vs. Hobbs:

A sold pigs to B and it was mentioned that B was to take pigs sold "with all faults". The pigs were diseased and B suffered a heavy loss. It was held that as it was expressly agreed that the seller was giving no warranty and he had done nothing to conceal the defect, he was relieved from all liabilities in respect of any defect in the goods.

Kannak Kumari Vs. Chandan Lal :

The plaintiff entered into an agreement with the defendants for the purchase of two machines for rupees one lakh, out of which Rs.25,000 was payable when the machines were installed and put in working and running ordered by the defendants. It was stipulated that in case the machines were not put into working order, they would be kept by the purchaser, but the above Rs.25000 would not be paid to the seller and would be forfeited. One of the machines did not work satisfactory and could not produce marketable goods. It was held that the plaintiff was entitled to claim damages.

Communication of Special terms in a contract:

When any special terms are to be included in a contract, it must be duly broguht to the notice of the offeree at the time when the proposal is made. It is

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the duty of the person who delivers a document to give adequate notice to the afferee about the terms and conditions contained in. It it is not done, and if the contract is subsequently entered into, the offeree will not be bound by them.

For Example: 'A' transport company accepts goods of 'X' for being carried without any conditions. Subsequently, it issues a circular to the consignors limiting, its liability for the goods damaged or lost in transit. 'X' is not bound by this condition since it is not communicated to him prior to the date of contract.

In **Olley vs. Marlborough Court Ltd (1949) K.B.532)** A hotel put a notice in a room, exempting the proprietor from liability for loss of client's goods. It was held that the notice was not effective as it came to the knowledge of the client only when the contract to take a room for hire had already been entered int.

a) Ticket Cases:

We have already noted that every offer must be communicated to the offeree. Where the offer consists of several terms itis enough if a paper containing all the conditions have been delivered to the offer or his attention drawn to their existencde. The person tendering the ticket or receipt must do all that is necessary, to bring the condition to the notice of the acceptor. This point can be illustrated with the help of decided cases.

In **Henderson Vs. Stevenson (1875) 2 H.L.** the plaintiff purchased a ticket from a steamship company. On the face of the ticket, the words "From Dublin to whitehaven" were written. On the back of the ticket, there were some conditions, One of which excluded the liability of the company for loss injury or delay to the passenger or his luggage. But, the palintiff had not seen the back side of the ticket and so he had no knowledge of this condition. His luggage was lost as a result of the negligence of the employees of the steamship company. the suit was brought for recovering the value of the luggage. It was held that the plaintiff was entitled to recover the amount for his loss from the company, as the was not bound, by the condition of which he had no knowledge.

So, when the offer contains conditions which do not appear on the face of the document, the duty of the offeror is todo what is resonably sufficient to draw the attention of the persons with whom he is dealing to such condition. suppose the words "see back" are printed on the face of a ticket and the conditions are printed on the back, in such cases, even if the passenger has not actually read the condition he may be bound by the condition, the fact that he did not or could not read does not alter the legal position. The leading case on this point is **Parker Vs. South Eastern Railway Co (1877),** In this case, the plaintiff deposited his

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bag in the cloak room of a railway station. On the face of the ticket issued to him, it was written " See back". One of the conditions limited the liability of the company for loss of any package to 10 Pounds, Unless extra charge was paid. The plaintiff's bag was lost and he claimed 24.50Pounds, being its value. The question arose whether in view of the words "see back" printed on the face of the ticket the defendant company could invoke the condition of exoneration from liability, printed on the back of the ticket. The holder of the ticket admitted knowledge of the printed matter on the ticket admitted knowledge of the printed matter on the ticket but denied having read it was held that the plaintiff was bound by the conditions on the back of the ticket even if he had not read them and therefore the suit was dismissed and it is found that the defendant had done what was reasonably sufficient to give notice of the conditions to the class of persons of which the plaintiff belonged, then the defendant relied upon the exoneration condition.

In India, the law as laid down in Parker's case has been followed in **Mackillican Vs. Compagnie des Messageries Maritimes. (1879) ILR 6 Cal. 227.** The plaintiff in this case was a business man. He purchased a ticket from a french company. The ticket was written in the French language. The plaintiff knew this though he could not read that language. It was held that he was bound by the condition and so could not recover damages for loss of the luggage.

Tickets purchased for entrace into places of amusement or as evidence of contract for transportation often contains small printed matter which attempts to limit or define the rights of the holder. The stipulations contained in the printed matter do not become part of the offer and are not accepted by the holder if he is not aware of the printed matter. It may therefore, be concluded that when some of the terms of an offer are not shown on the face of the document (e.g. Railway Ticket), it is to be considered whether in the circumstances of the given case the offeror has done what is reasonably sufficient to give notice of such terms to the class of persons to whom the offer is made, belongs.

In, **Thompson, Vs. M. & S. Railway Co. (1930) I.K.B**. 411 the plaintiff ticket from the defendant railway company. On the face of the ticket, it was written that "For conditions, see back". One of the conditions exempted the railway company from liability for personal injuries to passengers. The plaintiff was injured by a railway accident. Held that, he was bound by the conditions and could not recover damages.

Therefore where an offer contains, several terms a communication drawing the attention of the offeree to the existence of those conditions is sufficient unless the acceptoris not in a position to understand them due to lack of education or

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old age in which case reasonable steps will have to be taken to make the acceptor understand them. It is important to draw the attention of the offeree to the condition imposed by the offeror. In determining those questions the class of persons to whom the special conditions are offered, and the degree of intelligence to be expected of them may properly be taken into account.

b) Automatic Machine Cases:

In some places, tickets are issued by automatic machines. The customer puts the money in a slot and gets a ticket. The contract is concluded when he puts his money into the machine. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms so long as they are sufficiently broght to his notice. He is not bound by the terms printed on the ticket if they differ from the notice because the ticket comes after the contract is already made.

In **Thornton Vs. Shoe Lane parking Ltd (1971)**, the plaintiff drove in his car to an automatic car park. There was a notice at the entrance giving the rates for parking and stating 'All cars parked at owner's risk. He put the money in the automatic machine and got a parking ticket for the car. On the back of the ticket it was stated that "This ticket is issued subject to the conditions of issue as displayed on the premises". The plaintiff did not see the back of the ticket or the conditions displayed on the premises. While the plaintiff left his car in the parking building, he was injured by the negligence of the defendant's servants.

It was held that the defendant was not liable to pay damages to the plaintiff. Lord Denning observed that, "the old fashioned ticket cases' did not apply to automatic machines. The customer is not boundby what is printed on the back of ticket as the contract is complete before the ticket is issued and the ticket is only a voucher for the money.

2.7 SUMMARY

In this chapter, you have studied the formation of contracts. It describes the meaning and essential elements of an offer and acceptance and the concept of Invitation to offer. Further, you can understand the rules for communication and revocation of offer and acceptance and the various modes for termination of offer. Moreover, many illustrations and case laws are given for your easy understanding about offer and acceptance.

2.8 KEYWORDS

1. Assent - Consent or to express agreement to what is proposed.
2. Ambiguity - Uncertainty of meaning in the words of a written instrument.

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3.	Plaintiff	-	A Person who brings an action in a court of law
4.	Defendant	-	A Person against whom a civil action is brought
5.	Ignition	-	Set on fire
6.	Suit	-	Any legal proceeding of a civil nature brought by one person against another.
7.	Existence	-	to have actual being or continuance
8.	Termination	-	Come to an end, to put an end
9.	Terminology	-	To study or use of terms or the technical terms used on science, Art etc.
10.	Entitle	-	give a right to claim something or to give a title to a person.
11.	Revocation	-	It is the reversal by anyone of a thing done by himself.
12.	Chaffer	-	Bargain
13.	Maunds	-	A kind of weight used in India.

2.9 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **2.1**
	Question No.2	...	Refer Section No. **2.1.1**
	Question No.3	...	Refer Section No. **2.3**
	Question No.4	...	Refer Section No. **2.4.2**
	Question No.5	...	Refer Section No. **2.5**

2.10 EXERCISE QUESTIONS

A. Short answer Questions

1. Distinguish between offer and Invitation to offer.
2. Distinguish between express and implied offer.
3. Write short Notes on.
   - (i) Cross offer and counter offer.
   - (ii) Carlill Vs. Carbolic smoke ball co Ltd.,
   - (iii) Hyde Vs. Wrench.
   - (iv) Tinn Vs. Hoffmann & Co.
   - (v) Ticket cases
   - (vi) Standing offer or Tender
4. State the effect of silence on acceptance?

B. Long answer questions

1) What is an offer? state the legal rules of a valid offer? or Discuss the essential requisites of a valid offer?

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2) "An offer need not be made to an ascertained person but no contract can raise until it has been accepted by an ascertained person." Explain this principle referring leading cases.

3) Define acceptance and what are the legal rules relating to an acceptance? (or) Explain the essential elements of a valid acceptance?

4) "An acceptance to an offer is what a lighted match is to a train a gunpowder" It produces something which can be recalled or undone" comment.

5) Discuss briefly the law relating to communication of offer, acceptance and its revocation. When can an offer and acceptance be revoked?

6) What are the modes for termination of an offer?

7) Explain the term 'offer' and state how "Invitation to offer is different from it with illustrations.

UNIT - 3
CONSIDERATION

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INTRODUCTION :

Consideration is one of the essentials of a valid contract. Consideration is understood as some matter accepted or agreed upon as a return or equivalent for the promise. Infact, consideration is a technical term used in the sense of **"quid pro quo"** which means something in return. when a party to an agreement promises to do something, he must get something in return. A promise made without consideration is not enforceable by law. According to section 25, "an agreement without consideration is void". So, a contract whether oral or in writing, to be valid and enforceable, must be supported by consideration.

UNIT OBJECTIVES

- To Study about the meaning and classification of consideration
- To understand the legal rules as to consideration.
- To analyse the concept of 'privity of contract' and privity of consideration.
- To know the rules of consideration in discharge of contract
- To study the differences between English and Indian law.

UNIT STRUCTURE

3.1. Definition and Meaning

3.2. Legal Rules relating consideration

3.3. Agreement without consideration is void

3.4. Past consideration is no consideration

3.5. Privity of contract and privity in consideration.

3.6. Consideration and Discharge of contracts.

3.7. Distinction between English and Indianlaw

3.8. Summary

3.9. Keywords

3.10. Answers to check your progress

3.11. Exercise Questions

3.1 DEFINITION AND MEANING

Consideration is the foundation of every contract. The law enforces a contract which is made for consideration. In simple words, consideration means

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something in return. [quid pro quo] When a party to an agreement promises to do something he must get something in return. This something is called as consideration.

For example : 'A' agrees to sell his plot to 'B' for Rs.2 lakhs. Here The 'plot' is the consideration to B and the price of 2 lakhs is the consideration to 'A'.

A promise without consideration is null and void. It is called a naked promise or 'Nudum pactum'. If 'A' promises to pay 'B' Rs.1,000/- without getting any thing in return, this constitutes a bare promise and gives no right of action.

'Pollock' defines, consideration is the "price for which the promise of the other is bought".

Sir William Anson has stated the importance of consideration that offer and acceptance bring the parties together, and constitute an outward resemblance of a contract, but most systems of law require, some further evidence of the intention of the parties and in default of such evidence refuse to recognise an obligation. This further evidence of the intention of the parties is supported by consideration, which is one of the essential elements of a valid contract.

3.1.1 DEFINITION :

Under English law, there is no single definition of consideration which is universally followed. Consideration was defined in the case of **Currie Vs. Misa (1875)** thus : "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given suffered, or undertaken by the other".

In **Thomas Vs. Thomas (1842)** case, it was defined as follows "Consideration means something which is of some value in the eye of the law, moving fom the plaintiff, it may be some detriment to the plaintiff or some benefit to the defendant."

A most commonly accepted definition of consideration is given in the famous English case **Currie Vs. Misa (1875)** as "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or under taken by the other".

Sir Frederick Pollock defines consideration as "An act or forbearance of one party, or the promise there of, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable".

Consideration must be an act or forbearance or of some value in the eye of the law. The promisee must suffer a legal detriment. Therefore, a benefit to

Check Your Progress Questions
1. What is consideration?
2. What is meant by quid pro quo?

the promisor or a detriment to the promisee is a sufficient consideration for a contract.

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The American Restatement gives the following definition for consideration, "Consideration for a promise is

a) an act other than a promise or

b) a for bearance or

c) the creation, modification or destruction of a legal relation or

d) a return promise bargained for and given in exchange for the promise"

Now let us discuss the definition of consideration under Indian law.

Section 2 (d) of the Indian Contract Act defines consideration thus :- "When, at the desire of promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise"

For Example :- A agrees to sell his house to 'B' for Rs.5,0000. For A's prom

3.2 LEGAL RULES RELATING TO CONSIDERATION

3.2.1. IT MUST MOVE AT THE DESIRE OF THE PROMISOR :

The first essential element of a valid consideration is that the act or abstinence must have been done at the desire or request of the promisor. An act done at the desire of the third party or without the desire of the promisor is not a good consideration.

For Example :- 'A' saves B's goods from a fire accident without being asked to do so. Now, 'A' cannot demand the payment for his service.

Let us study this point through case laws.

In **Durga prasad Vs. Baldeo (1880) 2 All (221),** the plaintiff at the request of the District collector constructed some shops in a market. The defendant who was one of the tenants of the shop promised to give some commission amount to the plaintiff on all articles which he is going to sell through that shop in consideration that the plaintiff had spent much money in the construction of the building. But, the defendant did not pay the commission.

The court held that the agreement was void on the ground that the consideration (Construction of the shop) to the promise to give commission was not an act done at the desire of the promisor (the defendent) but it was done at

Check Your Progress Questions

4. Can consideration move from a stranger?

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the desire of the District collector and therefore the defendant was not liable to pay any commission amount to the plaintiff.

So, the liability arose only when the promisee does some act on the faith or desire of the promisor and the promisee has done nothing at the desire of the promisee, there is no consideration.

In **Abdul Aziz Vs. Masum Ali (AIR 1914 All - 268)**, The defendant promised to subscribe a sum of Rs.500 to B, to rebuild a mosque. But failed to pay the amount. More over, no steps were taken to rebuild the mosque. It was held that the promise was without consideration and that the subscriber was not liable. It was also pointed out that there was no consideration either in the sense of any benefit or advantage to A, the promisor, or detriment to B the promisee and the contract is void. Hence the suit was dismissed.

On the other hand in **Kedarnath V.Gori Mohammed (1886 I.L.R. 14 Cal. 64),** The Commissioners of the Howrah municipality created themselves as trustees by a trust deed for the purpose of building a town hall in Howrah. They invited and collected subscription for that purpose. The defendant was a subscriber to this fund for Rs. 100, having signed his name in the subscription book for that amount. As soon as the subscriptions allowed the commissioners including the plaintiff, who was also vice chairman of the municipality, entered into a contract with a contractor for the purpose of construction of the building. The defendant having failed to pay his subscription, a suit was brought against him by the plaintiff.

3.2.2. IT MUST MOVE FROM THE PROMISEE OR ANY OTHER PERSON:(PRIVITY IN CONSIDERATION)

According to English law, consideration must move from the promisee. But according to Indian law, consideration shall move from the promisee or any other person and need not necessarily move from the promisee alone. As long there is consideration for a promise, it is immaterial who has furnished it. The words used in section 2(d) of the Indian Contract Act "... the promisee or any other person..." clearly shows that consideration may move from the promisee or if the promisor has no objection, from any other person. Therefore, according to English law, stranger to a consideration cannot sue but in Indian law, even a stranger to consideration may file a suit.

3.2.3 ADEQUACY OF CONSIDERATION :- [value need not be adequate]

As already stated, consideration means **'something in return'**. It is not necessary that consideration should be adequate to the promise. But it must have

some value in the eye of law. Even a pepper corn may be a good consideration for a promise to pay Rs.50,000/-.

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The law simply provides that a contract should be supported by consideration. **Anson** in his book 'The English Law of contract' observes in this connection that Consideration need not be adequate and if it is of some value, which may be great or small, the courts will not enquire whether it was an equiavalent or adequate to the promise which he gave in return"

It has been recognized that the contracting parties are the best judges in deciding the adequacy of consideration. The parties are presumed to be capable of appreciating their own interest.

The English rule is applicable in India also. Explanation 2 attached to section 25 lays down that "an agreement to which the consent of the promisor is freely given is not void merely because the consideration is in-adequate". However, as a rule of equity, inadequacy of consideration is a factor to be considered in case of fraud or undue influence.

For example, A agrees to sell a house worth Rs.2 lakhs for Rs.100 to B. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the in-adequacy of consideration. If A's consent to the agreement was not freely given, then the inadequacy of consideration will be taken into consideration by courts.

In Thomos Vs. Thomos (1842) 2 Q.B 851) the court accepted a promise to pay, £.1 per year as annual rent for a big house as good consideration. The rent though nominal and manifestly inadequate didnot render the contract invalid.

In Desigowda vs.Karnataka Industrial Area Development Board (AIR 1996 Kant 197) It was held that in land acquisition ,land holders agreed to receive compensation under section 29 (2) of the karnataka Industrial Area Development Act, 1966, such agreement could not by itself be regarded as unconscionable and unreasonable and the court could not also examine inadequacy of agreed amount of compensation.

In the transactions by way of bailments,the courts were often faced with difficulties to find the presence of consideration.

In Coggs Vs. Bernard : (1703) 2 L.R. 909

The plaintiff declared that the defendant had undertaken to remove several containers of brandy from one seller to another. But the work was carelessly done and therefore a quantity of brandy was lost. The defendant contended that

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there was no consideration for the undertaking. It was held that 'the owners trusting the defendant with the goods is sufficient consideration to oblige him to a careful management".

In an another case of **Bainbridge Vs. Firmstone : (1838)** , the plaintiff owned two boilers and agreed to allow the defendant to weigh them, provided that they were to be returned in as good condition as they were lent. The defendant dismantled the boilers in order to weigh them and returned them in that state. The plaintiff sued and the defendant pleaded that there was no consideration for his promise. But the court held that there was detriment to the plaintiff in parting with the boilers even for a short time and therefore he was entitled to claim compensation.

3.2.4 IT MUST BE REAL AND NOT ILLUSORY :-

Eventhough the considernation need not be adequate, it must be real and of some value in the eye of law and not illusary. We have already seen that consideration is essential for a valid contract.

Consideration must be real and legal. A promise to do that what a person is by law bound to do, does not amount to consideration. Impossibility of a thing promised makes it an unreal consideration. For (e.g.) If a person promises to discover treasure by magic or to mark two parallel lines meet, it is illusory and not valid in law.

In **Collins. Vs. Godfrey,** a promised to pay money to a police officer to investigate into a crime. The agreement was held to be invalid because, the officer is already wonder a duty to do so by law.

A part from this, consideration should not be vague. For example : 1) 'A' promises to put life into 'B's dead daughter provided B pays him Rs. 5000/-. A's promise is physically impossible of performance.

2) 'X' engages 'Y' for painting his house and promises to pay a 'reasonable amount'. There is no recognised method of ascertaining the 'reasonable' remuneration. So the promise is unenforceable as it is uncertain.

To censtitute a valid promise, it is essential that an offer must be certain so that the rights, duties and obligations of the parties can be exactly fixed. A vague and ambiguous proposal does not convey what it exactly means and fixed the legal rights and obligation of the parties. Therefore, in order to be enforceable, promises not to do what a man legally cannot do is an unreal consideration.

In **Kulasekara perumal Vs. Pathakutty (AIR 1961) Mad 405.** It has been observed by the Madras High court that 'though the Indian contract Act

does not in terms provide that consideration must be good or valuable to sustain a contract, it has always been understood that consideration means something which is of some value in the eye of law. It must be real and not illusory, whether adequate or not ...

3.2.5 CONSIDERATION MAY BE PAST, PRESENT OR FURTURE : (Executed, Executory & past consideration)

Under Indian law, consideration may be past, present or future. All types of considerations are equally valid under Indian law.

The words used in the last part of the definition in section 2(d) are "has done or abstained from doing" (past) or "does or abstains from doing" (present) or promises to do or "to abstain from doing something" (Future) .. These words clearly indicates that the consideration may be past, present or future one.

a) Past consideration :

Past consideration is something which might have been done before the promise. When the consideration for a present posmise was given before the date of the promise, it is said to be past consideration.

For example : 'A' renders some services to 'B' during his minortity at B's request. After 'A' attaining majority. B promises to pay an annuity to 'A' for the services rendered to him in the past. It is the past consideration and 'A' can recover the promised amount from 'B' (**Sindha Vs. Abraham (1895) 20 Bom. 755**).

Under English law, the past consideration is no consideration. Consideration may be present or future but not past under English law.

b) Present or executed consideration

Executed means a present act or for bearance. When the consideration for a promise is given simultaneously with the promise, it is called present consideration or Executed consideration. It consists in doing an act in return for which a promise is given.

When one of the party to the contract has performed his past of obligation even at the time of its formation, leaving an outstanding liability against the other, then the contract is said to have arisen upon executed consideration since the consideration was executed at the time of formation of the contract.

In a cash sale, the consideration is present. For (e.g.) If 'A' buys certain goods from a shop and pays the price at the time of purchase itself, the consideration moving from 'A' is executed consideration.

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Check Your Progress Questions

7. What is meant by executory consideration?

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c) Future or executory consideration

A future or executory consideration is a promise to do or give something in return in future for the promise then made. In other words, when consideration from one party to other is to pass subsequently to the making of the contract, it is called future or executory consideration.

For example : A promises to deliver goods to B, when the ship arrives and 'B' promises to pay A. Rs. 10,000/- the receipt of goods. It is a case of future consideration.

Likewise, a promise to do a work, in return for a promise of payment is an example for executory consideration.

3.2.9 FORBEARANCE TO SUE :

Forbearance to sue has been regarded as valuable consideration. It is also a kind of abstinence, which is recognised as good consideration in the definition [Section 2 (d)] itself.

'For bearance to sue' means that if the plaintiff has certain right of action against the defendant or any other person and on a promise by the defendant, he refrains from bringing the action".

The Patna High court observed in a case of **Debi Radha Rani Vs. Ram Doss (AIR 1941 pat 282)**, where a wife who was ready to sue her husband for maintenance allowance has forborne to sue on her husband's agreement to pay her monthly allowance by way of maintenence. Here wife's forbearance to sue amounts to consideration for her husband's agreement for payment of maintenance amount. In an anothe case, **Kastoori Devi Vs. Chiranji Lal (AIR 1960, All 446),** where the withdrawal of a pending suit by a wife against her husband was held to be a good consideration for the promise to pay her maintenance.

3.3 AN AGREEMENT WITHOUT CONSIDERATION IS VOID

As stated above, consideration is an essential of a valid contract. According to section 25 of the Indian contract Act, "An agreement without consideration is void". This rule is based on a legal maxim **"Ex nudo pacto non oritur actio"**, which means 'no cause of action arises out of a nude or bare promise'.

In **Abdul Aziz Vs. Mazum Ali (1914)** Where a promise was given to subscribe Rs.500 for renovation of a mosque. But the defendant did not pay the amount. Held that, promise was not enforceable, and he was not liable to pay that amount.

Under Roman law, an agreement without consideration is called as "nudum pactum" and unenforceable. Under English law, Simple contracts must be

supported by consideration but formal contracts (contracts under seal) require no consideration.

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Exceptions :-

Section 25 and section 185 of the contract Act deal with certain exceptions to the general rule of 'agreement without consideration is void". The exceptions are based on the principle of equity. Now let us see the following exceptions.

1. Natural love and affection : [Section 25 (1)]

Agreements made out of natural love and affection is enforceable eventhough it is not supported by consideration. According to section 25 (1), 'When an agreement is expressed in writing and registered under the law in force and is made on account of natural love and affection between parties standing in near relation to each other. It is enforceable even there is no consideration.'

For example : 'A' out of natural love and affection, promises to give Rs.10,000/- to his son 'B' 'A' puts his promise to B in writing and registers it. It is a valid contract, even there is no consideration to the promise of 'A'.

To apply this exceptional rule, the following conditions are to be satisfied.

(i) The agreement must be between close or near relatives.

(ii) It must be made on account of natural love and affection.

(iii) It must be in writing, signed and registered under the Registration Act.

In Rajlucky Dabee Vs.Bhoothnath Mukherjee (1900) 4, Cal, An agreement is entered into by a husband with his wife during a quarrel and disagreement between them, whereby the husband promised to give some money and property to the wife.It was held that the agreement was void, because there was no natural love and affection between the parties.

2.Compensation for voluntary service :- [Section 25 (2)]

A promise to compensate wholly or in part, a person who has already voluntarily done something for the promisor is enforceable even though without consideration. Therefore a promise to pay for a past voluntary service is binding.

For example: (1) A supports 'B's minor son. 'B' promises to pay A's expenses for doing so. This is a contract.

(2) A finds B's purse and gives it to him. 'B' promises to pay A Rs.50. This is a contract.

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3. Promise to pay a time barred debt :- [Section 25 (3)]

According to section 25(3),a promise to pay either wholly or in part a debt, which is barred by the law of limitation.can be enforced if the promise is in writing and is signed by the debtor or his authorised agent. Therefore a promise by the debtor to pay a time barred debt is enforceable provided it is made in writing and is signed by the debtor or by his agent generally or specially authorised in that behalf. The debt must be a liquidated or ascertained sum of money and there must be a definite promise to pay. For Example : A owed of Rs.2,000. But the debt is barred by limitation. Any how 'A' agrees to pay Rs.1000/- and signs a written promise to B for Rs.1,000 on account of the debt. This is a valid contract.

4. Agency (Section 185)

According to section.185, no consideration is necessary to create an agency. The contract by which a person is appointed as an agent is called contract of agency. An agent is a person employed to do anything for another or to represent another in dealings with third persons. In a busy world, it is not possible for any man to transact all his business by himself. He has necessarily to delegate some of the acts to be performed to another person. The person who has delegated his acts is called principal.

5. Completed Gift :- (Explanation 1 of Section 25) The maxim` no consideration no contract' does not apply to completed gifts. Therefore, if a person gives certain properties to another by a written and registered document by way of gift, he cannot subsequently demand the property back on the ground that there was no consideration.

6. Charitable subscription:

Where the promisee, on the strength of promise, made by a promisor, makes commitments (i.e.) changes his position to his detriment, then the promisor, who promised to pay any charitable subscription must pay that amount,even there is no consideration to his promise. Refer 'Kedarnath Vs. Gori Mohameed' case, which is discussed, earlier.

3.4. PAST CONSIDERATION IS NO CONSIDERATION

In English law, past consideration cannot support a contract. It is long established in English law that 'consideration may be executory or executed but not past. A past consideration is no consideration at all But, in India this rule is not applicable.

Past consideration means a past act or forbearance that is one which took place is complete (wholly executed) before the promise is made. Whenthe

Check Your Progress Questions

6. What are the exceptions to Sec. 25 of contract Act?

consideration of one of the parties to the contract was given before the date of the promise it is said to be past. In other words, where the promiser had received the consideration, before the date of promise, such type of consideration is called as past consideration. For example : if A does some work for B in the month of April and in the month of June, B promises to pay him some money. In this particular example, A does some work for B without expecting any payment. Here consideration is past consideration

If the consideration is past, it is more a sentiment of gratitude or honour prompting a return for the benefit received (i.e.) it is no consideration at all.

In the words of **Street,** 'the consideration and the promise involved no detriment to the promisee in respect of the promise and it confers no benefit on the promisor with reference to the promise'.

The rule of past consideration is no consideration is baed on the principle that consideration being the price for the promise, consideration must move either simultaneously with the promise or after the promise. So, the consideration may be present or future but not past.

In an **English case law of Roscorla Vs. Thomas (1842)3 Q.B.234,** the defendant sold a horse to the plaintiff and the next day, in consideration that the plaintiff had bought the horse, the defendant promised that it was sound and free from vice. The plaintiff sued for breach of this promise alleging that the horse was not free from vice.

It was held that there was no consideration for the promise and the sale could not be a consideration since it was already completed before giving the promise and therefore it was past consideration and the promise was unenforceable for want of consideration.

Exceptions to the rule in English Law:-

(i) Past act done at the request of the promisor:

Under English law, the past act is divided into two kinds. (i) Past voluntary act and (ii) past act done at the request of the promisor.

Past Voluntary Act:

It means past act done without the request of the promisor.

Past act at request:

It means past act done at the request of the promisor. Where the past consideration of services rendered at the request of the promisor, it is good consideration and it would be valid eventhough past.

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For example: 'A' lost his bag shop. 'B' the finder of bag gave it to 'A'. So 'A' promised to give Rs.1000/-. Here, the consideration for the promise to give Rs.1000/- is B's past voluntary act of returning the bag to 'A'. It is not a good consideration under English Law.

In the above example, if 'A', after missing his bag requested 'B' to trace it and 'B' also traced out the bag at his request. Thereafter 'A' promised to give Rs.1000/- to B. Here, the consideration for the promise is B's past act at request. It is a good consideration under English law.

In **Lampleigh Vs. Brathwait (1615)**, the defendant had killed obne patrick and he was under sentence of death for so the asked the plaintiff, Lampleigh to help to obtain pardon from the king. The plaintiff incu8rred certain expenses for obtaining king's pardon and because of his efforts, the defendant obtained king's pardon and therefore subsequently he promised to pay 100 pounds to the plaintiff for his past service. But he failed to pay that amount. The plaintiff sued for the sum so promised.

It was held that the services rendered at the request of the promisor constitute valuable consideration for a subsequent promise. So, the plaintiff was held entitled to recover the amount.

So, past services performed at the request of the promisor would amount to consideration only if it was assumed at the time that the service was untimately intended to be paid for.

(ii) A precedent (or) Time barred debt:

A promise to pay a precedent or time-barred debt is valid and enforceable if it is in writing and signed by the promisor.

In the case of a debt barred by limitation, an acknowledgement by the debtor canbe sued on by the creditor even though the consideration is for the past debt.

We have already seen that if a debt is barred by limitation the debtor could waive the defect and promise to pay the amount which will be enforceable. For example, a borrowed Rs.2000 from B and executed a promissory note. According to the limitation Act the period of limitation is three years. B did not pay the amount due under the promissory not before three years. 'A' the creditor does not sue within the period allowed and the debt becomes barred by limitation. 'A' then makes a promise to pay the time-barred debt. This subsequent promise was enforceable.

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(iii) Negotiable Instruments:

When a negotiable instrument (promissory note, Bill of exchange or cheque) is given in consideration of some past act, those act or forbearance becomes a good consideration for the issue of the negotiable instrument and it can be validly enforced.

In the case of a negotiable instrument the consideration may be antecedent debt or liablity. This is genuine exception to the rule that a past consideration is no consideration. Therefore, valuable consideration or a bill of exchange may be constituted by an antecedent debt or liability.

Indian Law

In India, past consideration is valid consideration. Indian law recognizes all the three types of considerations (i.e). The rule of 'past consideration is no consideration is not applicable in India. From the definition of section 2(d) itself, it is clear that 'an act done at the desire of the promisor' is a consideration. so, in India, past consideration is also a good consideration just like the present and future consideration.

In **Sindha Vs. Abraham (20 Bom, 755)**, the plaintiff rendered services to the defendant during his minority at the defendant's request. After he attained majority, the defendant promised to pay an anniuity to the plaintiff for the services. But he did not pay that amount. So, the plaintiff filed a suit claiming that amount.

It was held that the promise could be enforced, as the past services formed a good consideration under Indian law and therefore the defendant was liable to pay that amount.

Further, under Section 25, clause(2) 'a promise to compensate wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do " is inforceable as a contract.

3.5 PRIVITY OF CONTRACT AND PRIVITY IN CONSIDERATION

You have to understand the difference between privity of consideration and 'privity of contract.'

Doctrine of Privity of contract:- (A stranger to a contract cannot sue on the contract)

Privity of contract means the relationship subsisting between the parties to a contract.

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It is a general rule of law that only parties to a contract may sue and be sued on that contract. A stranger to a contract cannot sue in England as well as in India. This principle is known as privity of contract. It creates a legal bond between the parties to a contract.

The privity of contract is said to exist between two persons when there is a valid contract which can be enforced as between them. a person who cannot show such privity of contract is a stranger to the contract. This means that unless there is a privity of contract, a party can not sue on a contract.

According to this doctrine, a contract cannot confer any rights on one who is not a party to the contract even though the very object of the contract may have been to benefit him. Hence, a party to a contract alone can sue andbe sued for the enforcement of the contractual obligations and a person who is not a party or stranger to a contract cannot sue or be sued under a contract. Thus, if there is a contract between 'A' and 'B', 'C' cannot enforce it.

The leading case on privity of contract is **Dunlop tyre Co. Vs. Selfridge & Co. *1915, A.C.847),** the Dunlop Co, a manufacturers of motor tyres, sold large quantity of tyres at a certain price through agents under 'a' price maintenance agreement'. The agents agreed that they would not sell the goods at less than the retail prices advertised in the price list of the Dunlop company and would obtain similar undertakins from any retailer to whom they sold the tyres. One of their agents Dew&Co sold Dunlop tyres to selfridge & Co a sub dealer, who also agreed with selfridge company not to sell those tyres below Dunlop's list price and to pay the Dunlop Co, 5pounds as damages on every tyre under sold. But, selfridge & Co sold some tyres to a customer at less than the list prices and there upon the dunlop company sued against them for the breach.

It was held that an action would not lie, as the contracting parties were Dew & Co and selfridge co. and the Dunlop Co. could not sue on a contract to which they were not a party (stranger to contract).

The application of the doctrine of privity of contract has been recently reassessed by the House of Lords in **Beswick Vs. Beswick (1968, A.C.58),** Lord Denning criticized the rule of privity of contract as a nineteenth century innovation, and further viewed that it is only a rule of procedure. As already seen, a stranger to a contract cannot enforce a contract but in the present case, the promisee under a contract may be able to obtain an order for specific performance against the promisor to compel him to carryout his promise infavour of the third party. In the above case of **Beswick Vs. Beswick** the plaintiff's

Check Your Progress Questions
5. What is meant by privity of contract?

husband namely peter Beswick was a coal merchant who was assisted by his nephew John Beswick (the defendant). Subsequently, peter Beswick transferred his business to his nephew. this was made in return to a promise made by John Beswick to employ him as the "consultant" and on the event of his death, to pay an annuity of 5pounds per week to his widow. (the plaintiff). But, after his death, his nephew failed to pay the promised sum of money to the widow. So, she brought an action against the defendant in her personal capacity as beneficiary of the contract and also in the capacity as administrator of her deceased husband's estate, claiming specific performance of contract.

The House of Lords held that although she was not entitled to enforce the obligation in her personal capacity since she was a stranger to the contract, she could, in her capacity as personal representative of her husband, Peter Beswick, obtain specific performance of the promise infavour of herself.

Exceptions :

The rule of privity of contract is subject to various exceptions. The exceptions were introduced in order to give protection to the interest of the third parties to a contract. The following are the exceptions to the general rule of privity of contract (ie) a stranger to a contract cannot sue upon it.

(i) Insurance :

Under the Road Traffic Act, 1930, insurance policies can be taken to cover risk of accident to third parties. In such cases, third parties can enforce claims on policies covering road accidents as required by the provisions of the contract (ie) The insurer can be sued by the third party accidents to whom are covered by the insurance policy. This is a statutory exception to the rule that stranger to a contract cannot sue upon it. This exception is also recognised by India Law.

(ii) Beneficiary under trust or charge :

Where a contract creates a trust in favour of a stranger, he can enforce the contract. A person in whose favour a trust or charge or other interest in some specific immovable property has been created may enforce it eventhough he is not a party to the contract. In other words, when a trust is created the beneficiary of the trust, can enforce the terms and conditions of the trust which are in his favour.

In the case of **Gandy Vs. Gandy (1884) 30, ch.D. 57,** where a husband who was separated from his wife executed a seperation deed by which he promised to pay to the trustees all expenses for the maintenance of his wife. It was held that the agreement created a trust infavour of the wife and it could be enforced.

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Check Your Progress Questions

3. Can a stranger to a contract sue?

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This exception is also recognised by India Law.

Charge created over property :

Where a promise is made to an individual for the benefit of a third party and a charge on specific immovable property is created for the performance of that promise, then the third enforce the same. The leading case on this point is **Khwaja Mohammed Khan Vs. Hussaini Begum** (1910) 32 AIL 410. In this case A, a Mohammedan entered into a contract with B on the occasion of the marriage of A's son with B's daughter, the plaintiff. Under that contract A agreed to pay Rs. 500 per month to the plaintiff as Kharch-i-pandon (betel box expenses) from the date of her marriage. The amount thus payable was made a charge on certain immovable property. It was held that the plaintiff though a stranger to the contract could maintain the suit as the agreement specifically charged immovable property for the payment of the allowance.

(iii) Marriage settlement, partition or family arrangements :

Where an agreement is made in connection with marriage, partition or other family arrangement and a provision is made for the benefit of a person he may take advantage of that agreement and he may sue although he is not a party to the agreement.

In case of family arrangements between male members of Hindu family which provide for maintenance or expenses for female members, the later through not parties to the contract possess on actual beneficial right which places them in the position of beneficiaries under the contract and can therefore sue. A provision for marriage expenses of a female member of a Hindu Joint Family can be enforced by the female beneficiary when such provision is part of a family arrangement. Persons nto parties to partitions or family arrangement claiming benefits provided fro them in such transactions really come under the category of beneficiaries and the arrangements conferring on them are in the nature of a trust. For example if A a Hindu father and B his son partitioned the family properties and provision has been made in the partition deed that a certain amount must be paid towards the marriage expenses of C the daughter of A, even though 'C' is a stranger to this contract she can enforce the contract. **Sundararajan Vs. Lakshmi Ammal** : A partition deed between brothers in a joint Hindu family contained a provision for payment of marriage expenses to their sister. It was held that their sister could enforce the provision though she was not a party to the partition arrangements.

In the case of **Rose Fernandez Vs. Joseph Gonsalves, ILR (1924) 48, Bom 673,** where a girl's father entered into an agreement for her marriage with

the defendant, it was held that the girl after attaining majority could sue the defendant for damages for breach of the promise of the marriage eventhough she was not a party to the agreement.

In an another case of **Shuppuammal Vs. Subramaniyam** (1910), 33. Mad 2), two brothers, who partitioned their joint family properties agreed to invest in equal shares, a certain sum of money for the maintenance of their mother. It was held that she (mother) was entitled to enforce the provision though she was not a party to the partition arrangement.

(iv) Acknowledgement or Estoppel :

Where by the terms of a contract a party is required to make a payment to a third person and he acknowledges it to that third person, a binding obligation is thereby incurred towards the third party. This exception covers cases where the promisor by his conduct, acknowledges, or otherwise constitutes himself as an agent of the third party.

(v) Covenants running with land :

The rule of privity of contract may be modified by the principles relating to transfer of immovable property. In the case of transfer of immovable property, the purchaser of the land with notice that the owner of the land is bound by certain condition or duties created by an agreement or covenants affecting the land, shall be bound by them although he was not a party to the agreement. This principle was well explained in the famous case of **Tulk Vs. Moxhay** (1919).

(vi) Assignment of a contract

The assignee of rights and benefits under a contract not involving personal skill can enforce the contract subject to the equities between the original parties to the contract.

(vii) Contracts entered into through an agent

In cases of agency, the principal can enforce the contracts entered into by his agent provided the agent acts within the scope of his authority and in the name of the principal.

Privity in Consideration

According to English law, consideration must move from the promisee and the promisee only. If it is furnished by any other person, the promisee becomes a stranger to the consideration and therefore, cannot enforce the promise.

But, according to Indian law. consideration shall move from any person and need not necessarily move from the promisee. As long there is consideration for a promise, it is immaterial who has furnished it. By the provision of sec. 2 (d) of the Indian contract Act. Consideration shall be furnished by the "promisee

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or any other person". Therefore according to English law, stranger to a consideration cannot sue but in India law, a stranger to consideration can also sue for consideration.

Let us illustrate this by an example. 'A' in consideration of Rs. 500/- received from 'B' promises to deliver a book to 'C'. Here 'C' is stranger to consideration. Because, the consideration of Rs. 500/- to deliver the book has been paid only by 'B'. In such cases, according to Indian law, the contract is enforceable by 'C'. But, according to English law, 'C' cannot enforce the contract.

In the case of **Chinnayya Vs.Ramayya : (1882) 4 Mad. 137,** An old lady gifted some of her properties to her daughter with a condition that she should pay some maintenance amount (annuity) every year to her brother that is, to the plaintiff. But the defendant did not pay the amount. In the suit, the daughter pleaded that no consideration proceeded from her uncle and he being a stranger to the consideration he could not sue. But it was held that in the face of the clear definition given by the Contract Act, rconsideration might move from any person and the consideration which has been furnished by the plaintiff's sister on behalf of her brother (the plaintiff) was a valid consiteration and therefore the plaintiff was entitled to claim for the annuity amount. This is sometime called the doctrine of **"constructive consideration"** which is recognized by Indian law but not by English law.

As already stated, under English law, a person who has not furnished the consideration for a contract cannot enforce the contract. In other words, a stranger to a consideration cannot sue. The party who wishes to enforce a contract must be able to show that he himself has furnished consideration for the promise of the other party.

In England, a person who has not furnished the consideration for a contract cannot enforce the contract. In other words, a stranger to a consideration cannot sue. The party who wishes to enforce a contract must be able to show that he himself has furnished consideration for the promise of the other party. It is immaterial for the purpose of this rule whether he was a party to the contract or not.

In **Dutton Vs. Poole** (1688, 89, E.R. 352), a father was about to cut the timber on his estate in order to meet the marriage expenses of his daughter. His son intervened and agreed to pay 1000 to the daughter in consideration of the father not cutting the timber. But he did not pay the amount. In a suit by the daughter on the son's promise, the court affirmed the principle that a stranger to consideration cannot sue. But, it was held that as the parties were standing in

near relationship, it might be presumed that the consideration moved from the person suing. In this case, the doctrine of 'constructive consideration' was recognised by the court. (i.e.) a stranger to consideration could enforce the contract if he was near relation to the party who actually provided the consideration.

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But, the doctrine of constructive consideration was given up in an English case of **Tweedle Vs. Atkinson** (1861, 121, E.R. 762), and it was laid down that the consideration should move from the promisee alone. In this case, a contract was entered into between 'A' and 'B' after the marriage of A's daughter 'X' with B's son 'Y'. Bu this contract, 'A' agreed to pay . 200 to 'X' (son-in-law) and 'B' agreed to pay 100 to 'X'(daughter-in-law). But 'A' did not paid the sum of 200 to 'Y' as per the agreement and subsequently 'A' died. So, 'Y' sued A's legal representatives for recovering 200. It was held that 'Y' could not sue and enforce the contract as he was a stranger to the consideration.

There are some exceptions to this rule, recognised in English law. In the case of a negotiable Instrument, it is not necessary that the person seeking to enforce the instrument should himself have furnished consideration. Likewise, trusts constitute another important exception to the rule of privity in consideration.

3.6. CONSIDERATION AND DISCHARGE OF CONTRACTS

The doctrine of consideration established as an essential requirement for formation of a contract has been extended to discharge of discharge of contracts also. In the case of a bilateral contract consisting of reciprocal promises the consideration for one promise is the promise given by the other. Therefore, the release or waiver of one promise serves as a consideration for the release or walver of the other promise. In the case of reciprocal promises the promises of the offeror forms the consideration for the promise of the offeror, and in a subsequent agreement both parties agree that their respective promises may not be enforced the subsequent agreement is valid and is supported by consideration. The consideration in such case consists in the promise of the offeror making a similar promise. The release or waiver of one promise serves as consideration for the release or waiver of the other promise. According to English law in the case of unilateral contracts with executed consideration, consideration is necessary for their discharge. Example: If in consideration of services rendered by X, Y promises to pay £ 10 to and subsequently X releases his claim for £ 10, still he can enforce it. Because his promise to waive is not supported by consideration.

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Accord and satisfaction

In England even after a person makes a promise to give up his claim under a contract, he can enforce the original claim, unless the subsequent promise of waiver is supported by consideration, since consideration, need not be adequate, it has been held that for such an agreement release or waiver of performance is sufficient consideration since, the consideration might take whatever form the parties decide, be it a pepper corn or a piece of chalk. But if this contract to release or waive an existing obligation is contained in a formal contract or specialaity the waiver is valid, be caused in the case of formal contracts consideration need not be present. This rule that a promise to release. or give up the claim under an unilateral contract is not enforceable, unless it is either reduced to a speciality or supported by consideration is known as the Doctrine of accord and satisfaction. Accord means an agreement between, two persons one of whom has a right of action against the other, the latter should do or give and the former accept something in satisfaction of the right of action. The agreement is the accord and the satisfaction is the consideration.

Limitation to the rule accord and satisfaction

1)Accord executed is satisfaction but accord executory is merely substituting one cause of action for another. A purchased a car from B and agreed to pay 5000 Rupees within one month. A new agreement was entered into, where A was to deliver a motor cycle in full payment of the amount. At any time before the motor cycle is delivered, B may recover Rs. 5000/- on original contract because the original promise to pay Rs. 5000/- remains subsisting, because the accord is 'only executory i.e. the motor cycle is not delivered). But if the motor cycle is delivered to B the, original promise to pay Rs. 5000/cannot be enforced since the accord or promise of waiver has been performed or executed. The delivery of the motor cycle constitutes the satisfaction of the accord and thus discharges the old contract.

British Russian Gazetree Vs. Associated Newspapers Ltd. (1933 2K.B. 616):

One Talboat agreed to compromise two actions of libel which had beer commenced by him and by the British Russian Gazette in respect of certain article: in the 'Daily Mail'. His promise was to accept 100 guineas. Before the paymen of this amount was made, Talboat disregarded the compromise and proceeded with the action. It was held that the agreement for discharge was valid as a promise for a promise.

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2) The second limitation is known as "The rule in Pinnel's case, which we are going to deal with elaborately. The rule laid down in the case was that a part payment of a debt in cash can never amount to a satisfaction for the whole debt. But alone with a certain amount of cash or even without it, a thing of a different species is delivered and accepted that would amount to a satisfaction of a debt.

The rule of accord and satisfaction is not applicable to Indian Law:

Thus executory accord is perfectly valid in India and the rule in Pinnel's case has no application. Section 63 of the Contract Act lays down as follows : "Every promise may with or remit, wholly or in part, the performance of the promise made by him or may extend the time for such performance or may accepted instead of it any satisfaction which he thinks fit".

Kapur Chand Vs. Himayat Ali Khan (A.I.R. 1963 SC 250)

Where a plaintiff, decree holder accepted from a third party a sum of money in full satisfaction of a large debt due from his judgement debtor's; held, the case was covered by illustration (C) of S. 63 the Contract Act, and the plaintiff having accepted payment from the. third party in full satisfaction of his claim was not entitled to sue the defendant for the balance in the view of S.41.

The rule that a part-payment of a debt in cash can never amount to a satisfaction of the whole debt was established in this case. in this case of **Pinnel Vs. Cole** (1602). Pinnel sued Cole in Debt to B, £ 10 on a bond due on 11th November 1600. Coles defence was that at Pinnel's, request he had paid him £ 5, 2s. On the 1st October and that Pinnel had accepted this payment in-full satisfaction of the original debt. The court observed that the payment of a lesser sum on the day in satisfaction of a greater sum was no satisfaction for the whole. But the court also said, "The gift of a house, a hawk or robe. etc. For it shall be intended that a house, a hawk or robe etc., might be more beneficial to the plaintiff than the money in respect of some circumstance or otherwise the plaintiff would not have accepted it as satisfaction".

In other words the payment of a lesser sum of money can be no consideration for the release of a debt for a larger amount.

Cumber Vs. Wone

In case of negotiable instruments the rule was applied. A owed B £ 15 and he gave B a promissory note for £ 5 in satisfaction, which B accepted. It was held that B could sue for the balance. The rule in Pinnel's case was reaffirmed by the House of **Lords in Foakes Vs. Beer.**

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Foakes Vs. Beer (1884, 9 A.C. 505) :

'A' obtained a decree against B for £ 2 390. 19th with interest. B paid the said principal amount in instalment and that was received by A in full satisfaction. Subsequently, A took out execution for interest. Held that since the doctrine of consideration has been definitely extended to the discharge of contracts of the payments of small resume would not amount to satisfaction of the entire sum due, as there was no consideration fat the promise to remit the balance am. the rule in Pinnel's case was approved.

In 1937, the Law Revision committee recommended the abolition of the rule in Pinnel's case. But the recommendation has not been implemented by statute. However, a recent development effected by courts following the rules of equity, has the effects of neutralizing the effect of the rule. The principle of promissory estoppel or quasi-estoppel was invoked in the High Trees case.

High Trees Case :

Central London property Trust Ltd Vs. High Trees House Ltd. (1947 K.B. 130) : In September 1937 the plaintiff leased a block of flats to the defendant at a rent of £ 2500 per annum for a term of ninety-nine years. Owing to war conditions the defendants were unable to let all the flats and it became apparent that they would be unable to pay the rent reserved by the lease in January, 1940. The plaintiff agreed in writing to accept a reduced rent of £ 1250 per annum. From 1940 to 1945 the defendant paid the reduced rent. In 1945 all the flats were let and the plaintiff's company then claimed the full rent. It was held that agreement of January, 1940 was intended as a temporary measure only and ceased to operate early in 1945. The rent originally fixed by the contract was there after payable and the plaintiff company was entitled to Judgement.

The most important point in the judgement lies in the fact that had the plaintiff sued for full rent between 1940 and 1945 the plaintiff would have been "estopped" by the previous promise from asserting the right to demand in full. The rule is considered as an ' "equitable" or "quasi-estoppel" '

Combe Vs. Combe (1951, 2 K.B. 215)

The scope of the High Trees Principle was considered in this case. In February 1943 a wife obtained a decree for divorce. The husband subsequently agreed to allow her £ 100 per annum as permanent maintenance. But the wife had not applied to the court for the permanent maintenance. Subsequent to his promise the husband did not make any of the agreed payments.

In 1950, the wife filed a case against her husband for enforcing the promise, but that was enforceable under the principle stated in the High Trees case, and gave judgement for the wife. On appeal by the husband, Denning L.J. held that there is no consideration and that the wife could not rely on any estoppel suggested by the High Trees case. It was held that principle must be used as a sword.

The present position is summarised by Cheshire in the following rules : 1) If a promise is given by one party to a contract not to insist upon his rights under the contract and there is no consideration for the promise, the promisee cannot sue upon it 2) If the promisor breaks this promise and sues on the sue original contract, the promisor may the promisee by way of defence. 3) To succeed in this defence the Promisee must satisfy the court that it is inequitable to allow the promisor to sue on the original contract and he will normally be able to do if he has acted in reliance of the promise. 4) If the promise was intended only to suspend and not to abrogate the rights of the promisor the promise will continue to operate until reasonable notice has been given by the promisor that he proposes to resume those rights.

Fortunately, no such controversies are likely to arise in Indian Law as Sec.63 of the Contract Act clearly provides that a promisee may dispense with or remit wholly or in part which he thinks fit, the performance of the promise made to him, or he may extend the time for such performance or he may accept anything instead of it. Further the following illustrations appended to the section will make the position clear. illustrations: (a) A owes B 5,000 rupees. A pays to B and B accepts, in satisfaction of the whole debt is discharged (b) A owes B 5000 Rupees. C pays to B 1,000 rupees and B accept them, in satisfaction of has claim on A. this payment is a discharge of the whole claim. (c), A owes B, under a contract a sum of money, the amount of which has been ascertained. a without ascertaining the amount given to B, and B in satisfaction thereof, accept the sum of 2,000 rupees. this is discharge of the whole debt, whatever may be the other creditors. A makes an agreement with his creditors including B to pay them a composition of eight annas in the rupee upon their respective demands. payment to B of 1,000 rupees in a discharge of B's demand.

Composition with creditors :

The compromise or a dispute of doubtful claim is a valuable consideration. A debtor who is not in a position to pay the entire debt may call a meeting of his creditors and request them to accept a lesser amount in satisfaction of their debt. If the creditors agree to it, the agreement is binding both upon the debtor and the

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creditors. In **Tinsukia Municipal Board Vs. Harkisen** (A.I.R.1957 Assam 10) it was observed that if an agreement is in settlement of a bonafide dispute between the parties, the settlement of the dispute itself is good consideration for the contract.

In a composition of creditors by a debtor each of the creditors agree to forgo a portion of their debt. Such an agreement is valid and binding on the creditor as well as the debtor. The consideration is the detriment suffered by the promisee. In such compromises the creditor is the promisee and since he is receiving less than what he is entitled to receive, there is certainly determent to the creditor is the promisee and since he is receiving less than what he is entitled to receive, there is certainly determent to the creditor i.e promisee. composition with creditors may be supported on the ground that no creditor can be allowed to go behind the composition agreement to the prejudice either of the other creditors or of the parties concerned. in such cases party to such an agreement cannot claim his original debt because to do so would be to commit a fraud on the other creditors.

Illustration

A owes B Rs. 5,000/- and also indebted to other creditors. a makes an agreement with his creditors including B to pay them a compensation of 50 paise in a rupee their respective demands. payment to B of Rs 2,000/- is a discharge of B's demand.

In some cases, the consideration for the composition instead of following from the debtor proceeds from a third person as where a third person promises to pay certain sum of condition that a certain debtor will be discharged from his liability to pay a certain debt.

Example (1) A owes 8, Rs.5,000/- C pays Rs.2,000/- and B accepts in satisfaction of his claim on A. This payment is a discharge of the whole claim (2) A sues to recover a debt of Rs.2,000/- from B and B denies the debt altogether. If a compromise is entered into between them by which B promises to pay Rs.1,000/- to A, this promise is supported by consideration and is valid. The real consideration in this case is the detriment which A suffers in foregoing what according to him is a good claim, for Rs.2,000/- and benefit to B lies in his non liability in a court of law. But it is very important to note that the claim must be reasonable in itself and should. not be vexatious or frivolous. The promise should have bonafide claim in law. If the claim is false to the knowledge of he promisor himself the consideration becomes unreal, and the compromise will not be binding on the promisor.

3.7. DISTINCTION BETWEEN ENGLISH AND INDIAN LAW

Difference between English law and Indian law:

i) In England, distinction is made between formal contracts and simple contracts. A formal contract or contract under seal, is nothing but a contract reduced in to writing and signed, sealed and delived by the promisor to the other party. All other contracts are simple contracts. According to English law 1) Contracts made without consideration 2) Contracts made by corporations and 3) transfer of shares in companies etc. should be made under seal.

But simple contracts may be made orally, in writing of imlies from conduct or custom by law. Formal contracts do not require any consideration but simple contracts must be supported by consideration. But the Indian Contract Act is only concerned with a simple or parol contract supported by consideration. It may be noted that formal contract as such is not known in India. Indian law of contract does not make any distinction between formal contracts and simple contracts. In India, all contracts require consideration. There are also certain exceptions to this rule. The general rule is an agreement made without consideration is void. section 25 of the contract Act gives some exceptions to this rule which we have already seen.

ii) According to English law, consideration may be executory or excuted but not past. Under English law, past consideration is no consideration and a contract based on past consideration is void. But there are some exceptions to this rule of English law which we have already seen.

Whereas, Indian law recognizes all the three types of considerations viz. executory, executed and past. Under Indian law, past consideration can be good consideration and will support a subsequent promise.

iii) Consideration means something which is of some value in the eyes of law. So, in English law natural love and affection is not sufficient in the support of a contract.

Whereas, in Indian law natural love and affection is a good consideration to an agreement. According to section 25(1), a promise made out of natural love and affection is enforceable one. It is an exception to the rule of agreement without consideration is void.

iv) Under English law, consideration must move from the promisee. Under Indian Law, consideration may move from the promisee or any other person. In other words, under English law a stranger to a consideration cannot sue. But in India he can sue. According to English law if. A pays 1 pound to B, and in consideration of that payment, 'B' promises to 'C' to deliver a book to

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him, the promise of B to C cannot be enforced becasue consideration did not proceed from C, but from a third person 'A'. In other words, it is said that C cannot enforce B's promise be cause cu's a stranger to the consideration supplied by A. But according to Indian law C can enforce the promise made by B. It is very important to note the distinction between a stranger to a consideration and a stranger to a contract. A Stranger to a contract cannot sue in England as well as in India.

3.8. SUMMARY

We hope that from this chapter, you can very well understand the meaning scope and legal rules as to consideration. This chapter explains the rule of privity of contract and privity in consideration and the difference between English law and Indian law. We have also analysed some other important concepts relating to consideration like agreement without consideration is void and its exceptions and consideration in discharge of contract with number of cases and illustrations.

3.9. KEY WORDS

1.	Annuity	-	A yearly payment of a certain sum of money
2.	Detriment	-	Damage
3.	Dismantle	-	To detach from their fittings.
4.	Enforce	-	Impose; compel
5.	Forbearance	-	Abstain or refrain from doing something
6.	Illusory	-	Deceptive or tending to deceive; not real
7.	Privity of contract	-	The relation subsisting between the contracting parties
8.	Sue	-	To take legal proceedings claiming a civil right against anyone.
9.	Vice	-	Wickedness; immoral contact

3.10. ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **3.1**
	Question No.2	...	Refer Section No. **3.1**
	Question No.3	...	Refer Section No. **3.5**
	Question No.4	...	Refer Section No. **3.2.1**
	Question No.5	...	Refer Section No. **3.5**
	Question No.6	...	Refer Section No. **3.3**
	Question No.7	...	Refer Section No. **3.2**

3.11. EXERCISE QUESTIONS

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A. Short answer Questions

1. Consideration must be real and not illusory - Discuss.
2. Consideration need not be adequate - Explain.
3. Executed and executory consideration - Explain.
4. Write short notes on
   a. Privity of contract
   b. Accord and satisfaction
   c. Rule in Pinnel's case
   d. High Trees case
   e. Dunlop Tyre co Vs.Selfridge &co Ltd.,

B. Long Answer Questions :-

1. Define consideration? and state the legal rules relating to consideration? or state the essentials for a valid consideration?
2. Define the term consideration with suitable illustrations and case laws and state the difference between the English law and Indian law.
3. 'An agreement without consideration is void'and state its exceptions?
4. 'Consideration may be executed, executory or past' - Discuss.
5. Explain 'past consideration is no consideration' and state its exceptions.
6. 'A stranger to consideration can sue but a stranger to a contract cannot sue' - comment.
7. Discuss the concept of privity of contract and privity in consideration and state the difference between them.

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UNIT - 4
CAPACITY TO CONTRACT

INTRODUCTION

According to both English law and Indian law parties entering into a contract must have the capacity to do so. At this stage, you must remember section 10 of the contract Act, according to which says an agreement becomes a contract if it is entered into between the parties who are competent to contract. One of the essential conditions for the validity of an agreement is that all the parties must have the capacity to enter into a contract. Capacity means competence of the parties to enter into a valid contract Section 11 of the contract Act dealswith the competency of parties. There are certain persons whose age, condition or status renders them incapable of binding themselves by a contract. Incapacity to contract must be proved by the party claiming the benefit of it.

UNIT OBJECTIVES

- ❖ To study about the competency of parties to enter into a contract
- ❖ To understand the legal rules relating to Minor's agreement.
- ❖ To know about the contracts of unsound mind persons.
- ❖ To learn about the persons dis-qualified by law' to a contract.
- ❖ To analyse the difference under Indian law and English law

UNIT STRUCTURE

4.1 Persons competent to contract

4.2 Minor's Agreement.

4.3 Delictual liability

4.4 Minor's liability for Necsessaries

4.5 Equitable doctrine of Restitution.

4.6 English law relating to minors agreement

4.7 Contracts of Unsound mind person

4.8 Persons disqualified by law to a contract.

4.9 Summary

4.10 Key words

4.11 Answers to check your progress

4.12 Exercise Questions

4.1 PERSONS COMPETENT TO CONTRACT :

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The denial of right to contract under Indian law is not purely arbitrary and is certainly based on the natural capacity of parties to contract. Section 11 of the contract Act deals with the competency of parties.

According to section 11, "Every person is competent to contract who is of the age of majority according to the law to which he is a subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject".

Thus the qualifications for attaining competency to enter into a contract are,

(i) The party to a contract must be a major person.

(ii) He must possess a 'sound Mind' and

(iii) He must 'not be disqualified according to law'.

Competency to contract is distinct from authority. Competence relates to the inherent qualities of a party, whereas authority refers to the scope of power of agents or representatives. This section postulates only inherent competence to enter into a contract.

Further the term "Competent person" in section11 embraces both natural person and legal person like corporation, company etc.

Section 11, mainly emphasis that the parties to the contract should be capable of understanding the terms and conditions of the contract and its effect. The general presumption is that a major and sound minded person can understand the agreement in it's full legal sense. Further, it emphasis that the person should not be disqualified by law to enter into a contract. Thus section 11 impliedly declares the incapacity of parties to a contract. Incapacity may arise due to mental deficiency or due to political or civil status. In capacity arising from mental deficiency of the contracting party may be classified as follows [a] Minors [b] insane persons [c] idiots [d] Drunken persons or intoxicated persons.

In capacity arising from the status of an indivual may be due to any of the following reasons.

a) Political or civil status, For example, where the person contracting is a Foreign sovereign, Ambassador, (or) Alien enemy, or convict or bankrupt etc.

b) Profession of the contracting person Example: i) a Barrister, ii) Corporation.

Check Your Progress Questions

2. Who are competent to contract?

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In short, the following persons are incompetent to enter into a valid contract.

(i) Minors

(ii) Persons of unsound mind and

(iii) Persons disqualified by any law to which they are subject.

Generally the contracts entered into the aforesai a incompetent persons are void.

4.2 MINOR'S AGREEMENT

An infant or a minor is a person who is not a major. Section 3 of the Indian Majority Act, 1875 defines the **'Age of Majority'**. According to this section, a persons who has completed the age of 18 years is a major every person who does not complete the age of 18 years is a minor.

In the following two cases, a minor attains majority after 21 years of age (i) Under the Guardian and wards Act, 1890, where a guardian has been appointed to a minor or his property.

(ii) Where the suprintendence of a minor's property is assumped by a court of wards.

In England, before the Family Reforms Act, 1969, the position was that a person attained majority only when he completes the age of 21 years. But, the Family Reforms Act, 1969 reduced the age of 21 to 18 years to attain majority.

So, the present position under English law is that a person who has completed 18 years of age is a major. Formerly a minor was referred to as an 'infant', but Family Reforms Act has changed the term as "Minor".

4.2.1. Nature of Minors Agreement

Infancy is said to be disqualification for entering into a contract but, really it is a protection to minors granted by law. A minor has an immature mind and cannot think what is good or bad for him.

Section.11 declares that a minor is not competent to enter into a contract. The reason of the rule contained in section.11 is that the young mind is immature, inexperience and more or less incapable of forming an accurate judgement or come to a conclusion on matters which is intimately concerned their interest. Therefore, a minor is not allowed by law to enter into a contract.

Check Your Progress Questions

4. what is the legal effect of Minor's agreement?

The minors agreements are based on the following two fundamental rules.

(i) The law protects minors against their own inexperience and preserves their rights and estates (property) and excuses their laches. It has been

observed that the "judges are their counsellors, the jury their servants and the law is their guardian".

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(ii) Secondly, the law should not cause unnecessary hardship to persons who dealwith minors.

4.2.2 Legal Rules regarding Minor's agreement:

A minor's agreement being void, ordinarily it shoud be wholly devoid of all effects. When there is no contract, there should be no contractual obligation on either side. There are various legal rules regarding minors agreement. Now, let us see the important legal rules relating to minor's agreement.

(i) An agreement with or by a minor is void ab initio:

Section 11 of the contract Act does not expressly state whether a minor's contract is void or voidable.

The courts in India were not unanimous on this point till the year 1903. But the privy council made it perfectly clear that a minor is not competent person to enter into a contract and that a contract by a minor is void abinitio. It was pointed out by the privy council in **Mohori Bibi Vs.Dharmadas Ghose (1903) 30 Ca1539(P.C.)**

In this case, the plaintiff was a minor. He mortgaged his house in favour of the defendant, to secure a loan of Rs.20000/- out of which the mortgagee (the defendant) paid the minor a sum of Rs.8000/-. The defendant was also aware of the plaintiff's minority. Subsequently, the minor sued for setting aside the mortgage, stating that he was minor while he executed the mortgage. The defendant contended that the court while setting aside the mortgage, should direct the minor to make compensation by refunding the amount which he had received and the minor's contract was only voidable.

But, the privy council rejected his argument and it was held that the minor's contract was void ab initio and therefore the mortgage made by the minor (plaintiff) was also void and he was not liable to repayment of the said amount.

By the decision of the privy council in Mohori Bibi's case, it is finally settled that in India, a contract with a minor is absolutely void.

In an another case of **Arumugham Vs. Dara Singh (1914),** a fresh promissory note was given by the defendant on attaining majority as renewal of another promissory note given by him during his minority, in consideration of money then borrowed.

It was held that as the consideration for the fresh promissory note is only the pronote executed during his minority, the fresh promissory note was

Check Your Progress Questions

1. Who is a minor?

(Space for Hints)

unenforceable and therefore the defendant was not liable to pay the loan amount to the plaintiff.

Thus, the legal effect of a contract with minors is void abi nitio [i.e.] from the beginning itself, the contract is void.

(ii) Beneficial contracts enforceable:

The minor can be a promisee or a beneficiary and there is no restriction on a minor from being a beneficiary. Beneficial contract means a contract entered for the benefit of a minor. It is enforceable by the minor if he had already performed his part of the obligation under the contract. In recent years, the judicial attitude has changed and now the courts allowing a minor to enforce a contract, if it is beneficial to him. The courts are applying the **Mohoribibi** case decision only where the relief is claimed against a minor. It the minor had performed his part of the obligation in a contract, then he can enforce the contract against the other party.

For example: 'A' [major] agreed to sell his bike to 'B' a minor aged about 17 years Rs.20000/-. 'B' also paid the entire amount. Now, suppose 'A' denies to deliver his bike to B. Then 'B' even he is a minor, can enforce the contract through court of law, because it is a beneficial contract to the minor and he has performed his part of obligation. 'A' cannot take the defence that a contract with a minor is void.

In **Raghavachariah vs. Srinivasa [[1916], 40 Mad 308]**, a mortgage contract was executed in favour of a minor, where the minor has advanced the whole mortgage money. It was held that the minor could get a decree for the enforcement of the mortgage because a beneficial contract to a minor is enforceable.

In the case of **General American Insurance Company Ltd vs. Madan lal Sonu lal [1935] 59 Bom, 656,** where a minor insured his goods with an insurance company. The goods were damaged. So, he filed a suit for his claim. The insurance company took the plea that the person on whose benefit the goods were insured was a minor. But, the court rejected the plea and allowed the minor to recover the insurance money.

Contracts of Marriage:

A contract for the marriage of a minor is also primafacie for his benefit. It has become well established that while the contract of marriage could be enforced against the other contracting party at the instance of the minor, but it cannot be enforceable against the minor.

Contracts of Apprenticeship:

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It is another species of contract which are beneficial to the infants [minors] as they provide him education and enable him to earn for his livelihood.

"In English law, contracts of service and apprenticeship are put on the same footing and in the same category as contracts for necessaires". The leading English case law on this point is **Roberts vs. Gray [1913] 1 K.B [520]**, where the defendant an infant [minor] agreed with the plaintiff, [Roberts] a noted billiards player to pay certain sum of money to learn to play billiards and to join him in a billiards playing tour of the world, to play in the matches. The plaintiff spent time and money in making arrangements for billiards matches, but the defendant [minor] repudiates the contract.

It was held that the contracts was beneficial to the minor who wished to become a professional billiards player and that the contract could be enforced against the minor and that the plaintiff recovered damages for the breach of contract.

For example: A contract was made for the infant's 'good teaching or instruction, where by the may profit after wards is also considered as beneficial contract to which minor is liable. Similarly, in Indian law, the Indian Apprentices Act, 1961 provides that contracts which are beneficial to minors are binding.

Trade Contracts not included in Beneficial Contracts;

Minor's beneficial contract does not include ordinary trade contracts. In **cowern vs. Nield [1911]**, a minor was carrying on business as a hay and straw merchant, He received a cheque from the plaintiff for supply of clover and hay. He delivered the clover which was rejected as bad and failed to deliver hay. The plaintiff filed a suit for recovering back the cheque amount. It was held that the minor was not liable to pay that amount. Because minor's contract is void and the trade contracts will not be included in beneficial contracts.

[iii] No Ratification:

The term 'Ratification' means 'subsequent approval of an act which has already done' since, a minor's contract is void ab initio, there can be no question of ratifying it, when a contract is entered into by a person during his minority cannot be subsequently ratified by him on his attaining majority. The general rule is that a contract which was then (at the time of formation) void cannot be made valid by a subsequent ratification.

If it is necessary, a fresh contract may be entered in to by the minor after attaining majority with the same terms of the former contract, provided that it

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must be supported by fresh consideration. So, the consideration which has passed from each other or one party to the other under the earlier contract during the minority cannot be substituted by the new contract without fresh consideration. In **Anant Rai vs. Bhagwan Rai [1939].** It was held that "A person can always make a fresh promise after attaining majority in terms of the promise made during minority. But, the necessary is that there should be some fresh consideration for it".

For Example:- In the case of **Indran Ramasamy Vs. Authiappa chettiar [1906],** 'A' minor borrowed Rs.5000/- from 'B' and executed a promisory note to B. Since the pronote executed during minority is void, after attaining majority, he ratified the old pronote by executing an another new pro-note in settlement of the first pronote without receiving any fresh consideration. It was held that, such ratification is not valid and the second pronote is void for want of consideration.

Thus, a minor is not liable to pay back a debt incurred by him under a contract during his minority. But if the minor paid the debt incurred during his minority, he cannot afterwards recover it back (i.e.)he cannot file a suit for refund of that money.

In the case of **Smith Vs. King [1892],** a minor speculated on the stock exchange and he became liable to pay 547 Pounds to the stock brokers. Subsequently, after his attainment of majority, he gave two bills for 50 Pounds each in satisfaction of the original debt. It was held that the minor was not liable on the bills.

In **Sindha Vs. Abraham [1895]** it was held that where any services rendered at the desire of the minor expressed during his minority and continued at the same request after his majority, form a good consideration for a subsequent promise made by him infavour of the person who rendered the services.

(iv) Minor can always plead minority:

Even if, a minor has, by misrepresenting his age, induced the other party to contract with him, he cannot be sued either under contract or in tort for deceit, because if the injured party were allowed to sue against the minor, it would be giving him an indirect means of enforcing the void agreement. Thus, a minor can always plead his minority, as a defence in a court in order to avoid his liability under a contract.

In an important case of **Leslie Vs. Sheill [1914] 3 K.B. 607** the defendant, a minor, by fradulently representing himself as major, induced the plaintiff to

lend him 400 Pounds. Subsequently, the minor refused to repay it and therefore, the plaintiff sued him for recovery of the said amount, the defendant pleaded his minority.

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It was held that the minor's contract was void and the defendant [minor] was not liable to repay the amount.

(v) Doctrine of Estoppel not Applicable;

'Estoppel' is a rule of evidence by which a person is not allowed to go back upon his previous representations. When one person by his words or act or omission made another person to believe a thing to be true and to act upon such belief, then the person who has made the statement, act or omission cannot deny the truth of his earlier representation [i.e] "Shutting One's mouth from putting new things from his earlier representation".

For example: 'A' makes a representation to 'B' and 'B' acts upon that representation to his prejudice, 'A' is estopped as against 'B' from denying the truth of his representation.

This doctrine of estoppel is not applicable to minor's contract. When a minor by misrepresentating his age, has induced the other party to enter into a contract wisth him, he cannot be made liable on the contract. There can be no estoppel against a minor. In other words, a minor is not estopped from setting up the plea of minority.

There were conflicting decisions as to the application of the rule of estoppel. This controversy was finally settled in the case of **Sadiq Alikhan Vs. Jai Kishore [1928, 30 Bom 1346]** the privy council held that a deed executed by a minor is a nullity and the rule of estoppel is not applicable to minor's contract. If the estoppel is applied, then the minor will be held liable for contract, which the contract Act does not permit. But, in some cases, the court may require the minor to compensate the other party on the ground of equity. This is based on the rule that the minor can have no privilege to cheat men. For example. it a minor obtains property or goods by misrepresenting his age, he can be compelled to restore it, if the same is in his possession.

(vi) No Specific Performance:

A minor's contract being absolutely void, there can be no question of the specific performance of such a contract entered into by the minor. A guardian of a minor cannot bind the minor by an agreement for the purchase of immovable property. But a contract entered into on behalf of the minor, by his parent or guardian or the manager of his estate can be specifically enforced by or against

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the minor provided the contract is (i) within the scope of the authority of the parent or guardian and (ii) for the benefit of the minor.

(vii) No insolvency:

Since the minor is incapable of contracting debts, he cannot be adjusted or declared as insolvent by the court, eventhough there are dues payable from the properties of the minor.

(viii) Minor as a partner:

A minor being an incompetent to contract, cannot be a partner in a partnership firm. But under section 30 of the Indian partnership Act, he can be admitted to the benefits of partnership (i.e) to the benefits of an already existing partnership with the consent of the other partners. His liability is limited to the extent of his interest in the partnership.

(ix) Minor can be an agent:

A minor can be appointed as an agent. But he will not be liable to his principal for his acts. An agent is merely a connecting link between his principal and a third party. A minor as an agent, binds the principal by his acts without any personal liability and the principal alone is responsible to third parties for the acts of his minor agent.

(x) Minor as a joint promisee:

When contracts jointly entered by a minor and an adult person, in such a case, the adult will be liable on the contract but not the minor. It can not be enforced against minor; but it can be enforced against the adult person if it is a joint promise.

(xi)Liability of minor's parents and guardian:

A contract with a minor does not give the other party any right against the minor's parent or guardian. The minor's parents or guardian are not liable for contract entered into by him, eventhough the contract is for the supply of necessaries to the minor. But, if the minor is acting as an agent for his parents or guardian, then they shall be liable under the contract.

(xii) Contracts By Minor's Guardian

An agreement entered into by the guardian of a minor on behalf of the minor is valid, if it is within the powers of the guardian. When a guardian enters into a contract on behalf of a minor, the validity of the contract depends upon whether the guardian is acting within the scope of his legal powers or not. The contract by minor's guardian to be valid, the following two conditions must be

satisfied, viz, (i) the guardian must be competent to do so (ii) The contract mustbe a] for the minor's benefit or b] for the minor's legal necessaries.

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4.3. DELICTUAL LIABILITY (LIABILITY IN TORT):

Delictual liability means liability in tort. Generally,a minor is not liable in contract or in tort arising out of a contract. If the tort is directly connected with the contract and is the means of effecting it, the minor is not liable in tort. But, an infant who cannot be made liable in contract may be made liable in tort. When the tort is independent of the contract, the minor is liable for his tortious act. A tortious liability to a minor arises from a wrong, independent of contract.

In England, it was laid down in the case of **Johnson Vs. Pye [1665]**, that "an infant who obtains a loan of money by falsely representing his age cannot be made to repay the amount of the loan in the form of damages for deceit" [one kind a tort]. The court pointed out that if infants were held liable on their contracts by means of actions in tort, all infants of England would be ruined. Hence, a minor cannot be held responsible for anything which would be an indirect way of enforcing his agreement.

This principle has been generally followed in India. In **Hari Mohan Vs. Dulu Miya, [1934] 61 cal 1075** the Calcutta High court refused to held a minor liable in tort for money lent on a bond. The court observed that " If the tort is directly connected with the contract and is the means of effecting it and it is a parcel of the same transaction and therefore the minor was not liable in Tort".

But, where the tort is independent of the contract and the mere fact that a contract is also involved, will not discharge the infant from tortious liability, In such cases the minor is liable to torts. Thus, in order to make an infant liable for a wrongful act, it must be proved that the act was independant of the contract.

Now, let us see some illustrations through case laws.

Illustrations:

1) **In Jennings Vs. Rundall [1799],** Where the defendant, an infant had hired a horse to be ridden for a short journey, But he took it on a much longer journey and thereby caused injury to the horse. The court held that the infant was not liable on the ground that he was doing an act permitted by the contract though not with adequate skills. So, the plaintiff could not turn that what was in substance a claim in contract to one in tort.

2) **Burnard Vs. Haggis (1863),** the defendant who was a Minor and Cambridge University under graduate entered into a contract to hire a horse for riding. The owner of the horse (Plaintiff) expressly gave instructions that the

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horse should be used for riding only. But not for jumping. The minor lent the horse to his friend who used it for jumping. So the horse was injured and killed. In this case the minor was held liable. The object contemplated by the contract was riding and not jumping.

3) Ballet Vs. Mingay (1943 K.B.281), an infant hired a micro phone and amplifier and then he passed on and improperly parted with them to a friend. They were never returned to the owner. So the infant was held liable for the tort of detenue for his failure to return that instruments which he had hired. The wrong was held to have arisen independently of any bailment.

Thus there was a tort wholly independent of contract. So, the minor was liable to pay damages.

4.4. MINOR'S LIABILITY FOR NECESSARIES;

A minor is liable to pay out of his property for 'necessaries' supplied to him or to his dependants [(i.e.) father, mother, brother, sister etc]

Although a minor's contract is void ab initio if a person supplies necessaries to a minor or to his dependants, the minor is bound to pay for the necessries supplied to him. According to section 68 of the Indian contract Act, a supplied to him or any one whom he is legally bound to support. Section 68 reads thus. "If a person incapable of entering into contract or any one whom he is legally, bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person". A minor is a person incapable of contracting with others. Under English law, the liability is not contractual, but itis based on a quasi-contract to pay a reasonable price for necessary goods supplied to him. In India the liability arises by virtue of the statutory provision under section 68.

The necessary condition for the applicability of section 68 are:

a) the goods supplied must be necessaries. b) the goods must be supplied to a person incapable of entering into a contract to anyone whom he is legally bound to support, c) the necessaries supplied must be suited to the conditions in life of the person incapable of entering into the contract. If all these conditions are fulfilled the person who supplied the necessaries is entitled to be reimbursed from the property of such incapapble person. Therefore section 68 of the Indian contract Act provides for liablility in respect of necessaries supplied to a person incapable of entering into a contract and a minor will come under such category. Till the decision of the privy Council in **Mohori Bibi Vs. Dharmadas Ghosh**

(30 Cal, 539) high courts in Indian were not unanimous about the effect of the contract entered into by a minor, but the decision of the privy council set at rest all such controversies and clearly laid down that all contracts entered into by a minor were void.

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In this case, the minor had executed a mortgage for Rs.20,000 out of which the lender had paid the minor only about Rs.8,000. The minor then filed a suit for setting aside the mortgage. It was contended that the contract was voidable and the minor now repudiating it, the account of Rs.8,000/- actually paid to minor must be refunded. The privy Council pointed out that as the minor's contract was void, no question of refunding the money could arise in these circumstances. According to Indian Law, a contract entered into by a minor is absolutely void and incapable of being made valid even by ratification. But a minor is always liable for the necessaries supplied to him because of S. 68, and the obligation of the infant is stated to be quasi contractual. In such a case the minors' estate is liable and the minor is not personally liable.

'Necessaries' mean those things that are essentially needed by a minor. They cannot include luxuries or costly or unnecessary things or articles. The term 'necessaries' include (i) Necessary goods (ii) services rendered such as education, medical expense, Training for trade legaladvice etc.

'Necessaries' are defined in Section 2 of the English the sale of Goods Act, as "goods suitable to the condition in the life of such an infant or other person and to this actual are classified as necessaries should be (1) suitable to the position and financial status of the infant, and (2) they must be necessaries at the time of the contract as well as delivery. What are necessaries depend upon the facts of each case. In English law an infant in personally liable for necessaries supplied. But in Indian Law the minor in not personaly liable but only his estate is liable for the necessaries supplied to him. Necessary things are those which a minor actually needs. Articles of luxury are always excluded. What articlesarenecessaries is a mixed question of law and fact.

In **Nash Vs. Inman (1908) 2 K.B.1),** the defendant, a minor and an under graduate at Trinity college, in Cambridge. He bought eleven waist coats form the plaintiff's shop on credit. this purchase was made by the minor when he was supplied with sufficient clothes by his parents. The court held that the said fancy waist coats were not necessaries and therefore the minor (defendant) was not liable to pay the price of the eleven waist coats.

Similarly in **Ryder Vs. Wombwell (1869) L.R. 4 Es.32** the defendant, a minor with an income of 500 pounds, a year bought from the plaintiff, a pair of

crystal, ruby and diamong solitaries. In a suit for the price, these articles were held to be not necessaries.

Loans incurred to obtain necessaries:

When a loan taken by a minor to obtain necessaries also binds him and is recoverable by the money lender as if he himself had supplied the necessaries **(Martin Vs. Gale (1876))**. In such case, the minor is not personally liable, but his properly is liable for such loans.

4.5. EQUITABLE DOCTRINE OF RESTITUTION:

'Restitution' means 'restoring or giving back the same thing'. The doctrine of restitution is applicable in minor's contract. If an infant obtains property or goods by misrepresenting his age, he can be compelled to restore it to the original owner but only so long as the same is traceable in his possession. This is known as the equitable doctrine of restitution. It was observed by a learned judge that "Infants can have no privilege to cheat men". Where the minor has sold away the goods to any bonafide purchaser or converted them, he cannot be made to repay the value of the goods. The basis of the rule is that 'infants are no more entitled than adults to gain benefits for themselves by fraud". For example, if a minor fraudulently representing himself to be of full age, and takes delivery of a motor bike after executing a promissory note in favour of the trader for its price, the court on equitable consideration will order for restitution. The court will compel the minor to return the motor bike to the trader which he took from the trader. But if the motor cycle cannot be traced the court will not grant any decree for money against the minors, because "Restitution stopped when repayment began".

For the application of the doctrine of restitution, the following conditions must be satisfied.

(i) the same goods or property which was obtained by the minor under the contract must be traceable in the possession of the minor.

(ii) the things obtained under the contract must be goods and not money.

If money is obtained by a minor under a contract. the doctrine of restitution cannot be applied.

4.6. ENGLISH LAW RELATING TO MINORS CONTRACT:

Under English common law, the age of majority was 21 years. But after the enactment of Family Reform Act, 1969, the age of majority was reduced to 18 years. At present, the minor is governed by the Minor's contracts Act 1987, which repealed the old Infants Relief Act, 1874.

Infants Relief Act, 1874

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The main object of the infant Relief Act of 1874 is to protect the interest of the infant. Under the pre-existing Common Law, the contracts of infants were generally voidable. Before the infant Relief Act of 1874, an infant could ratify the debt incurred by him during minority after attaining majority. But according to this Act, it is impossible to ratify the debt incurred by a minor after attaining majority. In the case of debts even a fresh promise on attaining majority would not bind him. The leading case on this point is **Smith Vs. King (1892) 2. Q B. 543,** an infant speculated on the stock exchange and became liable to pay 547 pounds to the stock brokers. After becoming a major he gave a bill for 50 sterling in satisfaction of that debt by way of compromise. It was held that bill though constituted a fresh promise was not enforceable since it related to a debt incurred during infancy.

In England, the section 1 of the Infants relief Act, 1874, declares the following categories of a minor's agreement as "absolutely void".

[i] contract for repayment of money lent or to be lent, or

[ii] contract for goods supplied or to be suplied (other than necessary) and

[iii] contract for accounts stated with infants.

'Accounts stated' means that it is an acknowledgement by a debtor that he owes, a certain sum of money to his Creditor.

In an important case of **Leslie Vs. Sheill [1914, 3 K.B, 607]** the defendant who was a minor, by fradulently representing that he was a major, induced the the plaintiffs, who were the money lender, to advance him 400 pounds. He failed to repay the loan amount. So, the plaintiffs filed a suit for recovery of loanamount. The court held that the action was not maintainable since the minor's contract is void abinitio and therefore, the defendant was not liable to repay the loan.

According to English law the general principle is that a contract between a minor and another having full capacity could not be enforced against the minor. But, this rule has three exceptions. They are [i] contracts of continuing obligation

[ii] Contracts for necessaries and

[iii] Beneficial contracts of service.

[i] Contracts of continuing obligation:

One set of agreements would be binding on the minor unless repudiated by him within a "reasonable" time after attaining majority. The reasonable time

Check Your Progress Questions

5. When is a person said to be of unsound mind?

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depends upon the circumstances of each case. Marriage, settlements, tenancy agreement, partnership agreements and agreements to take shares in companies could be brought under this category.

[ii] Contracts for necessaries:

It has been long established, that a minor is bound to pay for necessaries supplied to him. The English sale of Goods Act, 1979 defines 'Necessaries' as goods suitable to the condition of life of the minor and to his actual requirements at the time of the sale and delivery.

[iii] Beneficial contracts of service:-

An agreement entered into by a minor which is part of a contract of service will be enforced against the minor, if it is reasonable and on the whole for his benefit.

For example, apprenticeship, are beneficial to the infant as the provide him education and enable him to earn for his livelihood. It was held that such contracts were valid and enforceable depending upon the nature of the contract. The leading case on this point is : **Roberts Vs. Gray**(1913 I.K.B.520). It was held that a contract entered into by a minor to by a minor to pay a certain sum of money to a noted billiards player, John Roberts and to learn to play billiards and to play marches with him during his world tour, was beneficial to the minor who wanted to become a professional billiards player and that the contract could be enforced against the minor. Similarly in Indian law, the Indian Apprentices Act. 1961 provides that contracts which are beneficial to minors are binding.

A contract was made between a minor boxer and the british Boxing Board providing that the Board should grant the minor a boxing license which would enable him to take part in matches for championships. The question arose regarding the validity of the minor's agreement. It was held that the contract was valid as it was made for the benefit of the minor.

4.7. PERSONS OF UNSOUND MIND:

Sond Mind

A natural person besides, being a major must also possess soundmind to attain capacity to enter into a contract. Section 12 of the contract Act defines the term sound mind. Section 12 lays down that 'A person is said to be of sound mind for the purposes of making a contract if, at the timewhen he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interest.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mindmay not make a contract when he is of unsound mind may not make a contract when he is of unsound mind.

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Illustrations a) 'A' patient in Lunatic asylum, who is at intervals of sound mind may contract during those intervals b) A sane person who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract or form a rational judgement as to its effect on his interest, cannot contract whilst such delirium or drunkenness lasts.

From the above section aswell as from into illustrations, it is clear that the soundness of mind depends on two facts. 1) Capacity to understand the transaction concerned and 2) His abilityto form a rational judgement as to its effect upon his interest. If a person is incapable of both, he suffers from unsoundness of mind. It is for the court to be decide whether a party to the contract is of sound mind or not. In each case it is only a question of fact. If a person relies upon unsoundness of mind, he must prove it sufficiently to the satisfaction the of court.

Unsoundness of Mind:

Un soundness of mind does not mean weekness of mind or loss of memory. It means not only lack of capacity to understand the terms of the contract but also lack of understanding to realise the effect of the terms of the contract. There is always a presumption infavour of sanity. The person who takes the plea of Unsound mind, in a case, must prove it.

In English law, a person of unsound mind is competent to contract although he may avoid his contract if he satisfies the court that he was incapable understanding the contract and the other party knew it. and the contract is voidable at his option. On the other hand, in India, a contract with an unsound mind person is absolutely void.

Unsoundness of mind arises from insanity or Lunacy, idiocy or due to drunkeness. The Contracts with unsound mind persons is absolutely void abinitio.

(i) Lunatics:

A Lunatic is a person who is mentally deranged due to some mental strain or other personal experience. He suffers from intermittent intervals of sanity and insanity. He can enter into contracts during the period when he is of sound mind.

Section 12 deals with the case of lunatic, and has already been discussed above. In India, the contract of lunatic like that of a minor is absolutely void.

Check Your Progress Questions

3. Can a minor be adjudged as insolvent?

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In England, a, lunatic's contract is voidable. In **Imperial loan co Vs. Stone, (1892) Q.B.599,** it was held that the contract of a lunatic is binding upon him unless it can be shown that at the time of making the contract, he was wholly incapable of understanding what he was doing and that the other party knew his condition.

In Indian a lunatic's contract is void. The Privy council held in **Mohori Bibi Vs. Dharmodass case,** that the minor's contract is void. On the analogy of the rule in Mohori Bibi's case, an agreement by a lunatic or an insne person is also void under Injdian law.

In **Kimtu Vs. Lachhi Devi, 1999 AiHC 2533 (HP),** the property of an insane was sold by his wife, whose power of attorney was not valid. The purchaser also did not take care to verify facts. He resold the property the contract was held to be void and the property was recovered back without having to pay anything for improvements etc.

But both under English law and Indian law, a lunatic may enterinto a valid contract during lucid intervals. In a lucid interval, the mental deranged person regains his sanity. So he has contractual capacity in a lucid interval. Section 12, of the contract act also, clearly says that the lunatic may enter into a contract during lucid intervals.

(ii) Idiots:

An idiot is a person who has completely lost his mental powers. He does not exhibit understanding of even ordinary matters. Idiocy is permanent whereas lunacy is periodical insanity with lucid intervals. An agreement with an idiot is void like minor's contract.

In **Indersingh Vs. Parmeshwardhari Singh AIR 1957,** Where a properly worth about Rs.25,000/- was agreed to be sold by an person for Rs.7,000/- only. His mother proved that he was congenital idiot, incapable of understanding the transaction. The sale was held to be void.

Like the minor's contract if any necessaries are supplied to an idiot, lunatic or their dependants, their property is liable under quasi-contract. In England, a person of unsound mind is personally liable for necessaries supplied to him. But in India, anly his property would be liable. In **Jugal Kishore Vs. Chedder (1903, All, L.J.48),** it was held that an agreement entered into by a person of unsound mind is for his benefit and it can be enforced.

Check Your Progress Questions

6. Can an Indian citizen enter into a contract with an alien enemy?

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(iii) Drunkard or Intoxicated persons.

In India, Contract with a drunkard is void. A drunken or intoxicated person suffers from temporary incapacity to contract, (i.e) he is incapable of forming a rational judgement at the time when he is intoxicated. Partial or ordinary drunkenness of a contracting party is not sufficient ground to treat the contract as void.

It must be clearly proved that at the time of entering a in to the contract, the person pleading drunkenness as a ground to treat the contract as void, was fully intoxicated and was totally deprived of making any rational judgement and therefore he could not give a valid consent to the contract. The position of a intoxicated person is similar to that of a lunatic.

Under English law, a drunken person's contract is voidable. Only and not void and it can be ratified by him when he is sober, so as to bind him without any further consideration

In **Mathws Vs. Baxter (1873),** a drunkard who did not know what he was doing agreed to purchase some horses. After becoming sober, he confirmed that contract. The question arose whether the contract was binding upon him. It was held that under English law, the contract was only voidable and it can be ratified. So, the drunken person was held liable to the contract since he had ratified the voidable contract.

But under India law, as stated earlier, the contract of a drunken person is absolutely void, and incapable of ratification.

4.8. PERSONS DISQUALIFIED BY LAW:

If refers to statutory disqualifications imposed on certain persons inrespect of their capacity to enter into a contract.

i) Alien enemy:

A person who is not an Indian citizen is an alien. An alien may be either a friend or an enemy. During oridinary times the citizen of a foreign country has got the right to enter into a contract with any Indian citizen. But during war times, the right of an alien to enter into a contract with an Indian citizen is denied.

A contract with an alien enemy is void. But a contract with alien friend is valid. There cannot be a contract between as alien enemy and an Indian citizen during war. The rule is the same in England. During the subsistence of the war, an alien enemy cannot contract with an Indian citizen nor can be sued in an

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Indian court, except by obtaining permission from the Central Government. Whether a person is an alien enemy or not, has to be determined by the place of residence of the individual during the time of war. A contract made during war with an alien is totally illegal and wholly void. If a contract was entered into between the citizen of two countries before war, was declared the performance of the contract will be suspended during the course of war and shall be performed after the war is over. However, the government can put restrictions on the performance of these contracts if it is necessary on national interest. But, if the war continues for a long time, the contract becomes void because of impossibility of performance. It was held in **Porter vs. Freudenburg (1915) I.K.B. 857** that nationality is not the test of enemy status. In India, the right of alien enemies to sue is governed by section 83 of the code of Civil Procedure 1908.

(ii) Foreign Sovereigns and Ambassadors.

Foreign sovereigns and Ambassadors, diplomats enjoy certain special privileges and immunities from legal proceedings. Because of their diplomatic status and in the public interest they are disqualified to enter into a contract with Indians. But they can enter into contracts with Indian citizens through their agents in India and they can enforce those contracts in our courts. But an Indian citizen has to obtain prior permission of the central government in order to sue them in our Indian courts under section 86 of civil procedure code. The civil procedure code lays down the procedure in India that has to be followed in suit against rulers of Foreign status, Ambassadors and envoys. Foreign Sovereigns and ambassadors are not prevented from entering into a contract in India. But the Indian law imposes a restriction on it's enforceability. A suit against them has to be filled only with the permission of the central Government certified by the secretary to that government.

According to English law, foreign sovereigns can enter into contract, but cannot be sued upon unless they submit themselves to the jurisdiction of English courts.

In **Michell vs. Sultan of Jahore (1894) 1 QB,149,** the sulton of Jahore who was on a visit to england agreed to marry the plaintiff, an English woman. the suit was brought in England for damages for breach of this contract. It was held that the foreign sovereign could invoke his immunity under the Diplomatic privileges Act, 1708 and therefore, the suit was dismissed.

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(iii) Corporations:

Corporation is an artificial person created by law. It exists only only in the eyes of law. It can act only through agents. It cannot enter into a contract outside the powers granted by the memorandum of Association. Thus, the capacity to contract is limited to corporations and it is disqualified to enter any contract outside it's power.

The corporation has a distinct and separate legal personality from the totality of the members composing it. The corporation has no physical existence and can act only through human beings as it agents. The previleages which a corporation enjoys can be obtained by a special act or by registration under an Act. The corporation can purchase properties, enter into contract sue an be sued on such contracts. The contractual capacity of the corporation is limited and will be limited by the statutes governing it. The prominent features of a corporation are 1. Perpectual existence 2. A distinctive name and 3. A common seal. Corporations may be corporation sole or corporations aggregate.

Corporation sole:

The crown of England, a Bishop, the Post Master General are the examples fo corporation sole and some examples for corporation aggregate are E.G.Municipalities, Water supply corporations and Trading companies. A contract entered into by a corporation must be under its seal. A corporation cannot enter into a contract beyond the object for which it is brought into existence. For the purpose of borrowing money, a power to borrow must have been expressly or impliedly granted under the articles governing the corporation.

In **Ashbury Railway Carriage Co. Vs. Riche (1875) 7 H.L. 653**, it was held that a railway company incorporated with the object of manufacturing railway wagons could not enter into a contract for laying railway lines and that even ratification of the same by the entire body of its share holders could not validate the contract.

Therefore, a contract entered into by a corporation beyond the scope or object for which it is brought into existence is ultra vires and absolutely void. Even ratification of such contract by the members of corporation would not validate it. In order to make a valid contract by a corporation two conditions should be fulfilled, namely:

(1) the subject matter of the contract must be authorized by its contribution (2) and the contract must be entered into with due formalities as to resolution etc. in a proper form prescribed by the law.

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(iv) Convicts:

A convict is a person who has been sentenced and imprisoned by a court of law. A convict when undergoing imprisonment is incapable of enteringinto a contract. But if he is granted parole, during that period. he can enter into a contract. After the imprisonment period is over, or when he is pardoned. this incapacity to contract comes to an end. Thus, it is only a temporary disqualification as long as a person is undergoing imprisonment in a prison.

(v) Insolvents:

Insolvent is a person whose debts are morethan his assets. when a person is declared as an insolvent by the court, his ties will vest with the official receiver or official assignee, appointed by the court and the official receivers or assignee can sell the assets and distribute the sale proceeds among the creditors of the insolvent. During the period of insolvency, a person cannot enter into a contract. The official receiver alone can enter into a contract relating to his property and sue and be sued on his behalf. The insolvent is disqualified from entering into a contract until he is discharged from his insolvency by the court. Once he is discharged from his liabilities, then he can enter into a valid contract.

(vi) Married Women:

Under the Hindu and Mohammedan law, a married woman is entitled to make a contract, so as to bind her property. A Hindu female is not, disqualified from entering into a contract and marriage does not take away or destroy any capacity possessed by them in that respect. Therefore, where a woman is married or not, according to Indian law, she has no disability in entering into contracts and she may sue and be sued in her own name in respect of her separate property. But in England, a married woman originally had a very serious disability in the matter of acquiring property and binding herself by contracts.

Under English law, before 1883, a married woman could not make a contract, but, now the law is the same as in India. In England originally after marriage, the wife's property vested in her husband and she became incapable of owning separate property or binding her property by contracts entered upon by her. But when she became a feme sole, either by death of the husband or divorce, then the disability imposed upon her terminated. Otherwise, their husbands were held responsible for their contracts. But all these Acts were superseded by the Law Reform (Married Woman and Tortfeasors). Act, 1935, Now in england a married woman can acquire property separately and can enter into contract and can sue and be sued. In India according to ancient texts, a married woman was entitled to enjoy and deal with her own property which is called Stridhana. the

distinction as found in England never existed in India. It is significant to note that a married woman in India and in England has got the right to bind her husband for the purchase of necessaries for house-hold purpose.

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(vii) Barristers:

In England, Barristers cannot enter to a contract with their clients for their professional fees. But in India, there is no such restriction.

4.8. SUMMARY:

Every person is competent to contract who is of the age of majority and soundmind and is not disqualified from contracting by any law. This chapter elaborates the competency of parties to enter into a contract and the legal rules of a contract made with minors and unsound mind persons and the difference between English law and Indian law relating to contract with minors and unsound mind persons are clearly given. Moreover, this chapter elaborately deals with the persons who are disqualified by any law to enter into a contract and many case laws and illustrations are given for easy undetstanding. We hope that you have understood the entire concept relating to the capacity of parties to a contract.

4.9. KEYWORDS:

1.	Arbitrary	-	Not seeming to be based on a reason, system or plan & some times seeming unfair.
2.	Ambassador	-	A personal representative accredited by the Head of one state to another.
3.	Analogous	-	Similar, Parallel
4.	Clover	-	A kind of plant with trifoliate leaves and small pink or white fragrant flowers
5.	Imprisonment	-	Confining in a prison
6.	Insolvent	-	Bankrupt, unable to pay off debts
7.	Insanity	-	State of unsound mind
8.	Intoxication	-	State of being drunk
9.	Plea	-	As used in courts of common law, the defendant's answer to the declaration of the plaintiff.
10.	Ratification	-	confirmation by approval
11.	Repudiate	-	To disown, to refuse to acknowledge or accept.
12.	Restitution	-	The Restoring of anything unlawfully taken from another
13.	Royalty	-	Amount paid to an author (writer) for commercialising his work (book) Amount paid for use of a patent marked by self - control

14.	Solitary	-	Living alone, single, lonely
15.	Sober	-	Not drunk, temperate, not overcome by passions
16.	Speculate	-	To guess, To form opinion
17.	Supersede	-	Replace, set aside

4.7 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **4.2**
	Question No.2	...	Refer Section No. **4.1**
	Question No.3	...	Refer Section No. **4.7**
	Question No.4	...	Refer Section No. **4.2**
	Question No.5	...	Refer Section No. **4.6**
	Question No.6	...	Refer Section No. **4.7**

4.11 EXERCISE QUESTIONS

A. Short answer Questions

1. What are necessaries? When is a minor liable on a contract for necessaries?
2. Who are the persons disqualified by law?
3. When a minor is liable in torts?
4. Write short notes on
   a) Doctrine of Restitution.
   b) Insolvent
   c) Convicts
   d) Alien enemy
   e) Unsound Mind persons.
   f) Beneficial contract of service to minors

B. Long answer questions

1. State briefly the law relating to competence of parties to a contract.
2. Explain the legal rules relating to Minor's agreement.
3. Discuss the law relating to contracts by persons of unsound mind?
4. Discuss the provisions of law relating to Minor's contract under English law and Indian law.

UNIT - 5
FREE CONSENT

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INTRODUCTION:

The next essential requirement of a valid contract is that the parties should give the free consent to the contract. When there is no valid consent, there is no valid contract. According to Section 10 of the contract Act, "All agreements are contracts if they are made by the free consent of the parties ....". It is essential to the creation of a contract that the parties should agree upon the same thing in the same sense. The contracting parties should have the identity of mind and that their consent to a contract must be free and real. Consent is said to be free when it is not caused by coercion, Undue Influence, fraud, misrepresentation or mistake. If there is no free consent, the contract is voidable at the option of the party whose consent is not free. Therefore, mutual free consent is essential to every agreement.

UNIT OBJECTIVES

- To know the concept of 'consent' and 'Free consent'
- To study about coercion, Undue Influence, Fraud and Misrepresentation.
- To analyse the distinction between English law and Indian law.
- To learn about 'mistake of law' and 'mistake of fact'
- To understand the meaning of 'Non-est factum'.

UNIT STRUCTURE

5.1 Consent and Free consent
5.2 Coercion
5.3 Undue Influence
5.4 Misrepresentation
5.5 Fraud
5.6. Mistake (Mistake of Law and Mistake of fact)
5.7 Summary
5.8 Keywords
5.9 Answers to check your progress.
5.10 Exercise questions.

5.1. CONSENT AND FREE CONSENT:

Mutual consent is essential to every agreement. There can be no binding contract where there is no consensus ad-item (Identity of mind). Consent means acquiescence or an act of assenting to an offer.

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Section 13 of the contract Act provides that, "two or more persons are said to consent when they agree upon the samething, in the same sense"

It means that there is no contract if the parties have not agreed upon the same thing in the same sense. If the parties enter into an agreement concerning particular persons or things but each has different things in his mind, there is no agreement and no contract comes into existence between them. When there is no consent, there is no contract. Salmond describes it as 'Error in consensus'. Thus, if there is no consensus ad idem between the parties, there is no contract.

For example: An illeterate woman executed a gift deed infavour of her grandson under the impression that she was executing a deed authorising him to manage her lands. She never intended to execute such a deed of gift and the deed was not ever read or explained to her. So, the deed was void and inoperative, since the consent of the woman was altogether absent to execute a gift deed. [**Baladevi Vs. Majumdar** AIR (1956)]

Free Consent:

Free consent of parties is one of the essentials for a valid contract. The parties to a contract should have identity of mind and also the consent of the parties must be real and free. Free consent is the consent which has been obtained by the free will of the parties.

Section 14 defines free consent thus "Consent is said to be free when it is not caused by

(i) Coercion as defined in section 15, or

(ii) Undue Influence as defined in section 16, or

(iii) Fraud as defined in section 17, or

(iv) Misrepresentation as defined in section 18, or

(v) Mistake subject to the provisions of sections 20,21,22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue Influence, fraud, misrepresentation or mistake".

When there is no free consent (i.e.) when it is caused by coercion, Undue influence, fraud or misrepresentation, there can be no consensus ad idem and the contract is voidable at the option of the party whose consent is so caused. (Sec.19 and 19 A).

Check Your Progress Questions

1. Define consent ?
2. What is free consent ?

For example:

'A' is forced to sign a promissory note (or) a saledeed at the point of pistol. 'A' knows what he is signing but his consent is not free. In such cases, the contract is voidable at the option of the party whose consent is so obtained.

Sir Frederick Pollock defines that for the formation of a contract, there must be 1) a mental assent to a promise in fact and 2) an intent to form a legal relation.

Flaw in consent:

A flaw in consent may be due to any of the following causes (i) coercion (ii) Undue Influence (iii) Fraud (iv) Misrepresentation (v) Mistake [a] Mistake of fact, or [b] mistake of law.

5.2 COERCION (Sec.15)

Coercion is threat or force used by one party against another for compelling him to enter into a contract. When a person is compelled to enter into a contract by the use of force by the other party or under a threat 'coercion' is said to be employed.

Coercion is defined in section 15 of the Indian Contract Act as follows: "Coercion is the committing, or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement".

Explanation: It is immaterial whether the Indian Penal Code is or is not in force in the place where coercion is employed.

Illustration: 'A', on board an English ship on the high seas, causes 'B' to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. 'A' afterwards sues 'B' for breach of contract at Calcutta. 'A' has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time in the place where the act was done.

The threat amounting to coercion need not necessarily proceed from a party to the contract. It may proceed even from a stranger to the contract. Likewise, it may be directed against anybody and not necessarily the other contracting party. The intention of the person using coercion should be to cause any person to enter into an agreement. The term coercion includes fear, physical compulsion and menace to goods.

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Check Your Progress Questions

3. Discuss the term coercion & Duress.

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Now let us see some examples.

(a) 'X' threatens to shoot 'Y' if he does not release him from a debt which 'X' owes to 'Y'. 'Y' releases 'X' under the threat. Here, release from debt liability has been brought about by coercion.

(b) 'A' threatens to Kill 'B' if he does not lend Rs.1 lakh to 'C'. 'B' also agrees to lend the amount to 'C'. Here the agreement is entered into under coercion.

5.2.1. ESSENTIAL INGREDIENTS OF COERCION:

The ingredients of coercion are as follows: 1. Coercion means a) committing or threatening to commit an act forbidden by the Indian Penal Code, or b) the unlawful detaining or threatening to detain any property.

2. The act, constituting coercion, must have been done or threatened witl the intention of causing any person to enter into an agreement.

3. The act, constituting coercion, may be directed at any person and no necessarily at the other party to the agreement.

4. It does not matter whether the Indian Penal Code is or is not in force ir the place where the coercion is employed.

1. Committing or threatening to commit any act forbidden by IPC:

If any person actually commits or threatens to commit any act which is forbidden by IPC inorder to obtain the consent for a contract, then the consent so obtained is said to be a consent obtained by coercion.

So, it is clear that to constitute coercion, it is not essential that the act in question must have committed. A mere threat is sufficient to commit the same, if it has been given with the intention of causing a contracting party to enter into the agreement. An agreement may be avoided on the ground that it was not obtained with the free consent of one of the contracting parties since his consent was procured by coercion.

For example:

'A' threatens to shoot 'B', if 'B' does not sell his house to him. So, 'B' agrees to do so. Here, the contract is said to be induced by coercion because the act of threatening to shoot is a forbidden act by the IPC. Here, the consent of 'B' is not free. So, 'B' can avoid the contract.

In the case of **Renganayakiamma Vs. Alwar Chetty (1889) 13, Mad 214,** Where a young widow of 13 years of age was forced to adopt a boy under the threat of preventing the body of her husband who had just died, from being

removed to the cremation ground. It was held that their consent was not free but induced by coercion, as any person who obstructed a dead body from being removed would be guilty of an offence under section 297 of the Indian Penal Code. Therefore the adoption was set aside.

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Whether threat to commit suicide amounts to coercion:

In India, an attempt to commit suicide is an offence punishable under Sec.309 of the IPC. But, committing suicide or threatening to commit suicide is not an offence under the IPC.

The question whether threat to commit suicide amounts to coercion arose in **Chikham Amiraju Vs. Seshamma (1917) 41, Mad 33**, Where by a threat of suicide, a person induced his wife and son to execute a release deed infavour of his brother inrespect of their properties which they claimed as their own. It has been held by the majority of the Judges, that if a person holds out a threat of committing suicide, to his wife and son if they refuse to execute a release, in his favour and in consequence thereof they execute the release, the release must have been obtained by coercion, within the meaning of section 15. Though a threat to commit suicide was not punishable under the Indian Penal code it must be deemed to the forbidden act as an attempt to commit suicide was punishable under section 309 of the Indian Penal Code.

The court observed that the term any act forbidden by I.P.C. (in the definition of coercion) is wider than the term 'Punishable by I.P.C.'. Simply because a person escapes punishment, it does not follow that an act is not forbidden by I.P.C.

According to this judgement, though there is no punishment for a threat to commit suicide in I.P.C. that does not mean that it is not a forbidden act. It is an impliedly for-bidden act and it amounts to coercion.

2. Unlawful detaining or threatening to detain any property:

When any person unlawfully detains or threatening to detain any property (either movable or immovable) to the prejudice of any person for the purpose of getting the consent of a party to a contract, such act amounts to coercion and the contract is voidable.

In **Muthiah Chettiyar vs. Karuppan Chettiar (1927 50, Mad.786)**, an agent refused to handover the account books of a business to the new agent unless the principal released him from all liabilities during the term of his agency. So, the principal executed a release deed infavour of him inorder to get back the account books and the bonds. It was held that, the release deed was given under

coercion and was voidable at the option of the principal and held the release deed as invalid.

In **Bansraj vs. The Secretary of State (1939),** the government gave a threat of attachment against the property of the plaintiff for the recovery of the fine due from the son of the plaintiff. The plaintiff paid the fine. It was held that, the contract was induced by coercion.

3. The act of coercion may be directed towards any person:

The act of coercion may be directed towards any person (ie) it may be directed against the other contracting party or his relatives or friends.

4. The act of coercion need not be from the party to the contract:

There is no rule that the act of coercion must always proceed from a contracting party. An act of coercion committed by a third party on behalf of a contracting party will render the contract as voidable.

5. Legal effect of coercion:

Section 19 provides that a contract entered into under coercion is voidable at the option of the party concerned. According to section 72, a person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it.

For example:

1. Railway company refuses to deliver up certain goods to the consignees except upon the payment of an illegal charge of carriage. The consignee pays the sum charged in order to obtain the goods. he is entitled to recover so much of the charge as was illegally excessive.

The burden of proof that coercion was used lies on the party who wants to setaside the contract on the plea of coercion. A contract brought about the coercion is voidable at the option of the party coerced. The aggrieved party can have the contract set aside or he can refuse to perform it. The aggrieved party may if he so desires, abide by the contract and insist on its performance by the other Party.

5.2.2 DURESS:

The term coercion under English law is called as 'Duress'. It means actual violence or threat of violence. In other words, Duress means committing or threatening to commit bodily violence or imprisonment with a view to obtain the consent of the other party to the contract. A person is said to employ duress if he obtains the consent of the other party to the contract under fear caused by threats

of bodily violence and imprisonment. The threat must proceed from the contracting party or his agent and should be aimed at the other contracting party or his wife or parent or children. Duress is confined only to bodily violence and imprisonment. A threat of illegal imprisonment will amount to duress. But the doing of any act forbidden by the Indian Penal Code amounts to coercion. In case of coercion, it is necessary to determine whether the alleged act of coercion amounts to an offence under the Indian Penal code. If it is not an offence it does not amount to coercion. According to English Law, duress can be employed only against the life or liberty of the other party to the contract or the members of his family. Unlawful detention of goods is not duress. According to Indian Law, unlawful detention of goods is coercion, it can be employed against by any person, including a stranger.

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5.2.3. DIFFERENCE BETWEEN COERCION AND DURESS:

S. No.	Coercion	Duress
1.	It can be employed against any person including a stranger	It must be employed against the life or property of other party to the contract.
2.	It may be employed by any person, not necessarily by a party to the contract.	It can be employed only by the party to the contract or his agent.
3.	Coercion may not cause immediate violence.	Duress must cause immediate violence.
4.	Unlawful detention or threatening to detain of goods is coercion.	Unlawful detention of goods is not duress.
5.	Coercion need not be such as to affect a man with ordinary strength of mind	It must be an act such as to affect a man with ordinary strength of mind.

5.3 UNDUE INFLUENCE:

Undue influence means the improper use of any power possessed over the mind of the other contracting party. A contract is said to be induced by undue influence where one of the parties to the contract is in a position to dominate the will of the other party and he uses the position to obtain an unfair advantage over the other party.

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Section 16 of the Indian Contract Act defines undue influence thus : 1. "A contract is said to be induced by "Undue influence" where the relation subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses the position to obtain an unfair advantage over the other. 2. In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another : a] where he holds a real or apparent authority over the other; or where he stands in a fiduciary relation to the other, or b] where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. 3. Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person who is in a position to dominate the will of the other. Nothing in this sub-section shall affect the provisions of Section 111 of the Indian Evidence Act, 1872.

As per S.16, two conditions are to be established by a person pleading undue influence [1] that the other party to the transaction was in a position to dominate his will and [2] that the other party had obtained an unfair advantage by using that position.

Illustrations: a) 'A' having advanced money to his son B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. 'A' employs undue influence.

b) 'A' applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. 'A' accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

c) 'A' a man enfeebled, by disease or age, is induced by B's influence - over him as his medical attendant to agree to pay 'B', an unreasonable sum for his professional services. 'B' employs undue Influence.

In case, there is undue influence consent is not free and accordingly the contract is voidable. The position of the parties must be such that, one person is in a position to dominate the will of another. This principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. By virtue of that position, the aggrieved party would have been put in disadvantageous position or should have been suffered.

Check Your Progress Questions

4. What is meant by undue – Influence?

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Undue Influence usually arises in contracts made between relatives or persons in a fiduciary capacity. A state of fear, by itself does not constitute undue influence. Assuming a state of fear, amounting to mental distress which enfeebles the mind, there must be further action of some kind, the employment of pressure or influence by or on behalf of the other party of the agreement.

In order to establish undue influence it must be proved that the influence was such as to deprive the person affected the free exercise of his will. An advice or argument cannot constitute undue influence. Mere suggestions or appeals cannot amount to undue influence. A persuasion, which leaves a person free to adopt his own course is not undue influence. A friendly advice is not undue influence unless thereby the functioning of a free mind is destroyed.

The following relationships are said to raise a presumption of under influence: 1. Parent and Child 2. Solicitor and Client 3. Trustee and Beneficiary 4. Guardian and Ward. 5. Spiritual adviser and disciple 6. Doctor and Patient 7. Husband and Wife, 8. Master and servant 9. Creditor and Debtor 10. Principal and Agent.

Allcard Vs. Skinner (1967) 36 Ch.D 445, the plaintiff joined in a sisterhood and she was under the spiritual subordination of the defendant for some time during which period she gave away the bulk of her properties to the sisterhood. About six years after leaving the sisterhood, she sued for recovery of these properties. It was held that though the relationship between herself and the defendant raised a presumption of undue influence, her conduct in keeping quite for a period six years after any such influence ceased to exist, amounted to an affirmation of the gift made by her, and that she could not therefore recover the properties.

In **Mannu Singh Vs. Umadat (1890, 12 All 523),** a spiritual adviser indiuced theplaintiff, his devotee to gift to him, the whole of his property to secure benefits to his soul in the next world. Held that, such a consent can be said to be obtained by undue Influence.

The rule laid down in section 16 of the Indian Contract Act is not restricted to cases where strictly fiduciary relationship is established and applies to all varieties of relations where the possibility of exercise of dominion and influence exists. But, it is necessary that the conditions laid down in section, 16 of the Indian Contract Act should be satisfied in order to hold that a contract is affected by undue influence. A plea of undue influence can only be raised by a party to the contract and not by a third party. In cases of relationship of solicitor and client, the law is the same in England as well as in India. A pleader stands in a

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fiduciary capacity to his client and must be deemed to be in a position to dominate his will. It was held in **Wright Vs. Career (1930) 1, Ch.27 (C.A.)** that there is no objection to a sale by the client to his solicitor if the solicitor can prove. 1. that he had independent advice, and 2. that the price was a fair one.

A transaction between parent and child, resulting in a benefit to parent, creates a presumption of undue influence. Likewise, a master usually stands in a position to dominate the will of the servant.

In **U.P. Government Vs. F.R. Bhatia (A.I.R. 1956 Allahabad 439)** A. Government servant applied for leave which was to his credit. The granting of leave was being delayed. He was in dire need of leave. In his state of mental depression, he saw the duputy Registrar to enquire about the cause of delay. He was given to understand that unless an undertaking in writing was given by him that he would not return to duty after the expiry of his leave, his application might not have early disposal. In this state of affairs the servant succumbed to the suggestion and gave the required undertaking and his application for leave was then granted. It was held that the relation subsisting at that time between the deputy registrar and the servant was such that the former was in a position to dominate the will of the latter and that the consent to the undertaking was induced by undue influence, and it was held that the servant was in consequence, not bound by it.

In **Inche Noriah Vs. Shaik Allie Bin Omar (1929) A.C. 127, Comor** A aged illeterate woman made a gift of almost the whole of her property to her nephew who was managing her estates. The gift was set aside on the ground of undue influence.

Undue influence is suspected in the following cases: 1. Inadequacy of consideration. 2. Fiduciary relationship between the parties. 3. Absence of independent advisors for the aggrieved party. 4. Inequality between the parties as regards, age, Intelligence, social status etc.,

An agreement induced by undue influence is voidable at the option of the party whose consent was so caused. A contract induced by undue influence may be set aside absolutely or if the party who was entitled to avoid it has received any benefit thereunder, the court can set it aside upon such terms and conditions as may seem just. The aggrieved party if he desires can enforce it against the other party.

Unconscionable Bargains:

Where one of the parties to a contract is in a position to dominate the will of the other and the contract is apparently unconscionable, that is unfair, the law

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presumes that consent must have been obtained by undue influence. That is, when a person, forces another to enter into a contract by making an unconscionable use of his superior power he is said to make an "unconscionable bargain". Such a transaction is voidable. The question is not of fraud but of the unconscionable use of the superior power. Inadequacy of consideration though it will not of itself avoid a contract has great weight in such cases as evidence that the contract was not freely made. The fact of a bargain being unconscionable is not itself sufficient for setting aside a contract. It must be established that one of the parties was in a position to dominate the will of the other. Contracts cannot be avoided on the ground of unconscionable bargain simply because they are hard and harsh. Unconscionable bargains have been witnessed mostly in money lending transactions, But the principle is not confirmed to such transaction only. It is well settled principle that the mere fact that the borrower is in need of money or even in urgent need of money does not put the lender in a position to dominate the will of the borrower. The exaction of excessive and usurious interest even though there may be ample security does not by itself raise any presumption of undue influence, unless it is established that the lender was in a position to dominate the will of the borrower. In all such cases, it is necessary that the money lender must be in a position to dominate the will of the borrower, and the bargain, must be unconscionable within the meaning of clause (3) of section 16.

For example:

'A' a youth of 18 years of age, spend thrift and a drunkard, borrowed Rs.10,000/- on a bond bearing compound interest at 2% per month. It was held that the transaction is unconscionable, the rate of interest charged being so ex-orbitant. **(Kirpa Ram Vs. Sami – ud – din Khan 1903)**. Now, Let us see some cases on this topic.

1) Lakshmi Amma Vs. Narayana (AIR 1970, S.C. 1367)

In this case, the plaintiff executed a settlement by which his entire property was given to one of his grandsons. At the time of the execution, the plaintiff an old man was under treatment in a nursing home fixed up by that grandson. Held, that, there was a prima facie case of undue influence and the respondent failed to rebut this primafacie case and therefore the document was set aside.

2) In **Niko Devi Vs. Kripa A.I.R. (1989)** H.P. 51, a minor female child who had lost her parents was living with her cousin brother who was in a position of loco-parents (in the place of parents). A deed was executed by her in favour of her cousin brother. It was held that there was undue influence.

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3) Vinay Krishna Vs Keshav Chandra (A.I.R. 1993 S.C. 956)

In the case the question arose regarding the validity of a sale deed by a tribal woman who was old, illiterate, and blind, infavour of her relative with whom she was living till her death and was dependent on him and no consideration had passed at the time of the sale. The purchaser was obviously in a position to dominate the will of other party and take advantage of that position. The Supreme Court held that the onus will be upon him to prove that the sale deed was not executed under undue influence.

5.3.1. BURDEN OF PROOF OF UNDUE INFLUENCE:

According to section 16 (3) of the contract Act, where a person is in a position to dominate the will of another person, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the general presumption is that he might have used undue Influence for getting the consent of the other party to the contract. So, the burden of proving that the contract was not induced by undue Influence lies on the person who was in a position to dominate the will of the other.

5.3.2. PARDANASHIN WOMEN:

A pardanashin woman is one who lies in Seclusion having no communication except from behind the purdah or screen with any male except a few privileged relations. (i.e.) she is totally secluded from ordinary social intercourse. The law provides special protection to pardanashin ladies on the ground of their being ignorant so far as the worldly knowledge goes. The general presumption is that a contract with a pardanashin woman is induced by undue influence because they are totally ignorant of the world affairs. The contract is voidable at the option of such woman.

In the case of pardanashin women, the burden of proof usually on the person benefiting by the document executed by the pardanashin lady to show that they had independent legal advice and really understood and intended to execute the deed.

A contract with pardanashin Lady is valid, provided that the person who entered into the contract with such lady proves affirmatively with conclusive evidence that the terms and conditions of the contract were explained to her in detail and it was understood by her and the contract was entered only by the exercise of her free consent.

In Moonshe Buzloor Raheem Vs. Shumsoonisa Begum (1867), a widow remarried and endorsed and delivered to her new husband certain valuable

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Government papers. In an action to recover them back from him, she proved that she lived in Seclusion and that she had given over the papers to him for collection of interest. He contended that she had given her full consideration for the notes.

It was held that the mere fact of endorsement and the allegation of consideration were not sufficient to lift the presumption of Undue Influence. He should prove that that the transaction was a bonafide sale and that he gave full consideration for the paper which he received from his wife.

In **Life Insurance Corporation Vs. Nadrani, AIR 1970 Cal 200**, it was held that it the case of pardanashin ladies, the burden of proof is usually on the person benefiting by the document executed by them to show that they had independnt legal advice. The circumstances attendant upon the execution in such a case would be scrutinised more strictly when the document executed is a gift deed than when it is a mortgage deed.

In **P.N.Raj Vs. Tileshra Kaur (1965, All L.J.)**, the Allahabad High Court held that the rule regarding the contract with pardanashin lady equally applies to illiterate and ignorant women though they may not be a pardanashin.

5.3.3. LEGAL CONSEQUENCES OF UNDUE INFLUENCE: [Sec.19 (A)]

Section 19 (A) declares, when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Further it is also provided that "any such contract may be setaside either absolutely or, if the party who was entitled to avoid it, has received any benefit there under, upon such terms and conditions as to the court may deem just."

5.3.4. DIFFERENCE BETWEEN COERCION AND UNDUE INFLUENCE:

Undue Influence is a subtle form of coercion. In both cases, the consent of one of the parties to a contract is not freely and voluntarily given and the contract is voidable at the option of one of the parties whose consent is so obtained.

The following are the distinction between coercion and Undue influence:

(i) Coercion, involves the use of physical force while undue Influence is due to mental or moral threat or pressure.

(ii) Coercion involves doing or threatening to do an illegal act; But Undue Influence involves doing of an act which may not be illegal but is only unfair.

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(iii) In coercion, there is a threat usually to cause bodily harm to a person or to detain his property. But, in Undue influence, there is no threat to do an act forbidden by the penal code or to detain property.

(iv) In the case of Undue Influence, there must be certain relationship between the parties which places one party in a position to dominate the will of the other, where as, coercion need not be proceed from the promisor. It may proceed from a stranger to contract and may be directed against a stranger.

(v) When the consent of the promiser is obtained by coercion, the contract is voidable at his option; But, where the consent is obtained by Undue Influence, the contract is either voidable or the court may set aside it or enforce it in a modified form.

(vi) In the case of coercion, in addition to the avoiding of the contract, penal action may also be possible under I.P.C; whereas in the case of Undue Influence, the contract is voidable, but no penal action is possible.

5.4 MISREPRESENTATION: (Sec.18)

The word 'representation' means a statement of fact made by one party to the other, before or at the time, when the contract is made with regard to some existing fact or some past event, which materially induces the formation of the contract. Misrepresentation means representation of a statement of fact which is not true'. A false statement may be made by a person either (i) wilfully or (ii) innocently.

If the false statement is known to be false by the person making it, it is called **fradulent misrepresentation or fraud;** if it is honestly believed to be true, it is called an **innocent misrepresentation or misrepresentation.**

Innocent Misrepresentation:

It is simply called as misrepresentation. It is a false statement which the person making it innocently and honestly believes to be true or which he does not know to be false. It also includes non-disclosure of a material fact without any intention to deceive the other party. So, where the representator believes his assertion to be true and consequently has no intention of deceiving the other party is called as Misrepresentation. However, it may actually induce the other party to enter into the contract.

According to section 18 of the Indian Contract Act "Misrepresentation" Means and includes.

1. The positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true.

2. any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him.

3. Causing however innocently, a party to an agreement to the substance of the thing which is the subject of the agreement.

For example:

'A' a salesman, while selling his Radio to 'B', he tells that it is a Japan made Radio. 'A' while making this statement honestly believed that it is a Japan made Radio, because the words 'Made in Japan' is printed in the Radio. Believing this statement 'B' purchased the radio. Later, it was found that it is an Indian made Radio. Here, 'A' is guilty of misrepresentation.

5.4.1. ESSENTIAL INGREDIENTS OF MISREPRESENTATION:

(i) There should be representation or assertion of a material fact relevant to the contract.

(ii) It must be made with the intention that it should be acted upon by the person to whom it is addressed.

(iii) Such representation must have induced the other party to enter into the contract.

(iv) Such representation must be untrue; But the person who made it believes it to be true.

(v) The statement should not be a mere opinion or hearsay.

(vi) It must be made without any intention to deceive the other party.

A contract which is affected by innocent misrepresentation is voidable at the option of the aggrieved party. An innocent misrepresentation must be positive assertion of a fact and must not be a mere opinion. In innocent misrepresentation, the person making it honestly believes it to be true.

For Example:

'X' while selling his mare to 'Y', tells him that the mare is thoroughly sound. 'X' genuinely believes that the mare to be sound although he has no sufficient ground for the belief. Later on, 'Y' finds the mare to be unsound. The representation made by 'X' is a misrepresentation.[**Currie Vs. Rennick 1866**]

With regard to the contract, the general principle is that if one party has induced the other to enter into a contract by misrepresentation, though innocently,

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any material fact, specially within his own knowledge, the party misled can avoid the contract. According to common law, if misrepresentation has not been embodied in the contract, it is known as a mere representation and the representation is completely remediless, because the contract creates no contractual obligations. But the law of equity established the rule that a person who entered into a contract by the misrepresentation of the other party, is entitled to bring an action for rescession. He is also entitled to take the plea of misrepresentation as a defence in a suit for specific performance.

Silence of the vendor although it misleads the vendee does not constitute misrepresentation in law. A misrepresentation should infact materially affect the contract in order to give a right of avoidance. In **Ratan Singh Gulab Singh Vs. Namkaran Chotoma 1927 Sind P. 219,** where a hindu father agreed to sell the family property without necessity alleging that he is the only owner thereof is guilty of misrepresentation under section 18 of the Contract Act. A representation may be true when it is made but it becomes untrue subsequently to the knowledge of the person who made such representation before the contract is entered into. In such cases, if the contract is not corrected accordingly, the contract becomes voidable.

5.4.2. CONSEQUENCES OF MISREPRESENTATION:

When a misrepresentation has been made, the aggrieved party has the following alternative remedies:

[i] He may avoid or rescind the contract

[ii] He may affirm the contract and insist on the misrepresentation being made good.

[iii] He may rely upon the misrepresentation, as a defence to an action on the contract.

5.4.3 EXCEPTION:[Section 19]

Means of discovering truth

A party cannot complain of misrepresentation if "he had the means of discovering the truth with ordinary diligence." This is recognized by way of an exception stated along with Section 19. The statement is as follows:

"If such consent was caused by misrepresentation or by silence; fraudulent within the meaning of section 17, the contract nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence."

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In **Oriental Insurance Company Limited Vs. Gowramma AIR 1994 Kant. P.29**, it was held that where the motor vehicle Insurance Policy issued after due verification about the ownership of the vehicle and after accident, the insurance company was not allowed to take the plea that the policy was obtained by misrepresentation and that the claimant was not the owner of the vehicle.

In the following cases also, the aggrieved party cannot avoid the contract on the ground of misrepresentation,

[i] A contract cannot be avoided if the misrepresentation is not of a vital character affecting the substance of the contract.

[ii] After knowing the misrepresentation, if he had received benefit under the contract or in some other way affirms it.

[iii] If the agreement is not avoided within a reasonable time.

[iv] When the subject matter of the contract has been consumed or destroyed.

[v] When a third party acquires right in the subject matter of the contract in good faith for value before it is avoided.

In the case of **Philips Vs.Brooks 1919 K.B.243,** It was held that where 'A' purchased goods from 'B' by fraud and pawned them with 'C'. 'B' cannot rescind the contract on learning of the fraud so as to be able to recover the goods from 'C'.

5.4.4. RULES REGARDING MISREPRESENTATION UNDER ENGLISH LAW:

Under English common Law, a misrepresentation without fraud would not entitled the aggrieved party to recover damages or to render the contract voidable; but Law of equity has established the rule that where a person is induced to enter into a contract by misrepresentation of the other party, he is entitled to escape from the contract either by bringing an action for rescission or by pleading the misrepresentation as a defence to a suit for specific performance.

In Bannerman Vs. White (1861) 'A' entered into a contract with B for the sale of hops. A made a representation that no sulphur had been used in their growth. As a matter of fact, Sulphur had been used by A in five out of 300 Acres, which fact was evidently forgotten by A, when he represented that no sulphur was used. This representation however, did not form a term in the contract. The assurance by the plaintiff was innocent misrepresentation. The assurance intended to be a term of the contract, therefore a warrantly by the plaintiff. held that the intention of the parties was material inducing the consent of the defendant.

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Changes in English Law by Misrepresentation Act 1967:

Under this Act, (I) the remedy of damages is available for negligent misrepresentation. But contracts excluding liability for negligent misrepresentation are unenforceable by this Act.

(ii) Damages in lieu of Rescission:

Under the Act of 1967, the court is given a discretion to award damages in lieu of Rescission. For example: Suppose a car is sold on a misrepresentation as to the mileage done. If the remedy of rescission is granted, the car will have to be returned. The court may consider that it need not go so far. Then it may award damages in lieu of rescission. But, in a case of fraud, the court has no such discretion.

Condition and Warranty:

A condition is a vital term going to the root of the contract. Where a contract is affected by misrepresentation and if the misstatement ~~was~~ a condition of the contract may be repudiated, while a breach of the representation which induces the contract affects its formation, a breach of the condition or warranty affects its performance. The term of the contract may be warranty. Warranty means a subsidiary promise not going to the root of the contract. In cases where the term of contract is warranty and if the statement is false, the injured party can claim damages only but cannot repudiate the contract.

Exceptions to the rule that no damages can be obtained for innocent misrepresentation:

Under English law, the general rule is that damages cannot be awarded where a contract is vitiated merely by innocent misrepresentation. However, there are certain exceptions to this rule.

(i) the innocent misrepresentation may be embodied in the contract as a condition or as a warranty. In such a case damages would be available for the breach of the condition or warranty.

(ii) In the case of innocent misrepresentation, contained in a prospectus issued by the promoters of companies, the aggrieved parties can claim damages. This is because of specific provisions in the companies Act to that effect.

(iii) When a person claiming to be an agent of another induces person to enter into a contract with him as agent, he is liable for damages if the representation as to his authority as agent of another turns out to be false though it was only an innocent misrepresentation.

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Mere silences is not fraud

Ordinary silence does not amount to a representation. A party to the contract is under no obligation to disclose the whole truth to the other party. For example, A vendor who sells his unsound horse says nothing about its quality commits no found. Here, the principles of caveat emptor (i.e) 'Let the buyer aware' is applicable to contracts. Similarly, there is no duty to disclose facts which are within the knowledge of both parties. However there are certain exceptions to this rule.

EXCEPTIONS

Active concealment

The general rule is that a person before entering into a contract need not disclose to the other party about the material facts which he knows, but he must refrain from making active concealment. Active concealment means taking active and positive steps to prevent the information reaching the other party. Active concealment is fraud.

Moreover, two statutory exceptions are given in the explanation to sec 17.

Sec.17 (Explanation Clause)

(i) Where circumstance create a duty on the part of the person keeping silence to speak and

(ii) Where silence in itself is equivalent to speech.

(i) Duty to speak

Duty to speak arises when one party reposes a trust or confidence on the other. Where there is a duty or obligation to speak and a man is breach of that duty holds his tongue and does not say the thing, he was bound to say amounts to fraud.

In such cases the law requires, that person must disclose all material facts to the other party who reposes confidence on him. Failure to disclose any material facts will be treated as fraud. Such type of contracts are called **'Uberrimac fiedi contracts.**

In Uberrimac fiedi contracts there is a duty to dispose all material facts which are in the knowledge of one party. In cases of non-disclosure, the other party can avoid the contracts. Some examples of such contract are: contract of Insurance, family settlement or arrangement, contracts of marriage. Sale of shares in a company, surety contracts etc.

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(ii) When silence is equivalent to speech

In certain cases, a person's silence will amount to speech. In such cases, if a person keeps silent, then his silence will amount to fraud. For example. 'A' says to 'B' if you do not deny it, I shall assume that the horse is sound. A' ' says nothing Here A's silence is equivalent to speech. There are certain exceptions to these rule.

(iii) Change of circumstance

Sometimes, a representation is true when it was made, but it may become false, due to a change of circumstance, when it is actually acted upon by the other party. In such cases, it is the duty of the person who made of circumstances to the other party. Otherwise, his silence will amount to fraud.

(iv) Half truth

When a person has no duty to disclose a fact sometimes, he may voluntarily disclose something and then stops half the way. In such cases, it amounts to fraud for his silence regarding undisclosed facts. A person may remain silent, but if he speaks a duty arises to disclose the whole truth.

(v) If a seller fails to inform the buyer as to a latent defect (i.e a defect know to the seller and not apparent on an ordinary inspection) his silence amounts to fraud.

Effects of fraud (S.19)

When consent to an agreement is caused by fraud the agreement is a contract voidable at the option of the party whose consent was so caused. The aggrieved party has the following remedies.

(i) He can rescind the contract (sec.19 Para 1) when he does so, he must act within a reasonable time. If in the interval, while he is deliberating. If an innocent third party has acquired any right over the subject matter in good faith, he cannot rescind the contract.

(ii) He can insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true. (Sec.19 Para 2)

(iii) Apart from the above remedies, the aggrieved can sue for restitution or damages.

5.5. FRAUD

Fraud is the wilful misrepresentation of a material fact essential to a contract made by a party to a contract with an intention to deceive the other party

or to induce such party to enter into the contract. It means a false statement made knowingly or without belief in its truth or recklessly without carrying whether it is true or false.

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Section 17 of the Indian Contract Act defines fraud thus: "Fraud" means and includes any of the following acts committed by a party to contract, or with his connivance or by his agent, with intent to deceive another party there to or his agent or induce him to enter the contract: 1) the false suggestions as to a fact, of that which is not true by one who does not believe it to be true. 2) The active concealment of a fact by one having knowledge or belief of the fact 3) a promise made without the any intention of performing it or 4) doing any other act fitted to deceive 5) any such act or omission as the law specially declares to be fraudulent.

Explanation:

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that, regard being had to them it is the duty of the person keeping silence to speak or unless his silence is in itself, equivalent to speech.

Illustration:

a) A, sells by auction to B a horse which he knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A, b) B is A's daughter who has just come of age. Here, the relation between the parties would make it, A's duty to tell B that the horse is unsound, c) B says to A, "If you do not deny it, I shall assume that the horse is sound". A says nothing. Here, A's silence is equivalent to speech. d) A and B being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

When a misrepresentation is made by a party with full knowledge that it is true, or without belief in its truth, or recklessly, or carelessly whether it is true or false it is said to be fraudulent.

The Essential elements of fraud are: 1) There must be representation or assertion or an active concealment by a person of his agent.

2) It must relate to fact and not an opinion or intention.

3) It must have been made with the knowledge of its falsehood or without belief in its truth or recklessly or carelessly whether it be true or false.

4) It must have been made with a view to induce the other party to act upon the assertion.

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5) the other party must have acted upon that representation and must have been misled.

The term "fraud" includes acts committed by a person with a view to deceive another person. Fraud is committed where one person induces to enter into some contract or transaction on a false belief by a representation of a fact which is not true and which he does not believe to be true. Motive is irrelevant in fraud. The fact that the party who was misled had failed to avail himself of the same is immaterial because he was entitled to rely on the representation made to him by the other party. Fraud is dishonesty nor is recklessness. But if a man makes a statement carelessly or recklessly without caring whether it be true or false. It may be concluded that he was not honest.

Illustration:

A tells B that he has investigated the affairs of C company and that it is sound financially. A has not investigated C company's affairs. His statement is fraudulent, though he believed that the company is sound financially. If the party had known the truth he would not have entered into contract. Such error in cause makes the contract voidable at the option of the party whose consent was not free. In order to constitute fraud, the person making the statement must have been aware of the falsity of the statement. It has been said that all surprise, trick, cunning, dissembling and other unfair ways that are used to cheat anyone is considered and other unfair ways that are used to cheat anyone is considered as fraud. In order to constitute fraud what is really essential is the absence of any genuine belief in the truth of the statement.

In the leading case **Derry V.Peek (1899 14 A.C.337),** the directors of a Tramway Co. issued a prospectus stating that they had the right to run tram cars with steam power and not with horses as before. In fact, the Act incorporating the company provided that such power might be used with the sanction of the Board of trade. The directors who got their plans previously approved by the Board of Trade, though its permission was a matter of course, and issued the prospectors as stated above. On the faith of that prospectus, the plaintiff took shares. Subsequently the Board refused to give permission and the company had to be wound up. The plaintiff sued the Directors for damages for fraud. It was contended that in as much as the directors had no sufficient grounds for believing that permission would be granted, their representation, though honestly believing by them, would amount to fraud in law.

It was held by the House of Lords, in order that fraud should be established moral fraud must be proved and that legal fraud was as meaningless as legal heat

or legal cold. It was held that there was no representation amounting to fraud. This case established that a party is guilty of misrepresentation, which he believes to be true, but not based on proper grounds, is not guilty of fraud, but only of innocent misrepresentation.

It is fraud, intentionally to give false impression and induced a person to act upon it, even though each fact stated taken by itself may literally be true. Fraud is easily conceived by downright falsehood **(Suggestio falsi i.e., fraud by false assertion)** in word or deed. Suggestio falsi means false suggestion. The false suggestion, however in order to constitute fraud, must have been made. a] with an intent to deceive and b] have been known to be false or not believed to be true. The active concealment of a fact also however, amounts to fraud. It would be suppressio veri (Suppression of truth) though not suggestio falsi.

Kaetes Vs. Cadogan (1851) 10 C.B. 591: The plaintiff obtained a lease of a house from the defendant. The defendant knew that the plaintiff required the house for immediate occupation. He did not however, disclose the fact that the house was in a ruinous condition and was not fit for immediate occupation. He made no representation as to the fitness of the house for immediate occupation. The plaintiff's suit for damages for fraud was dismissed on the ground that the defendant had not made any representation at all.

In the case **Peek Vs. Gurney (1873) L.R. 6H.L. 377**, the prospectus of a company did not refer to the existence of a document disclosing liabilities. This gave the impression that the company was prosperous. When the existence of the document had been disclosed the impression would have been quite different. Held, non disclosure amounted to fraud.

In the case of **Smith. Vs. Chadwick: 1 (1882) 9 A.C. 1871** 'A' bought shares in a company on the faith of a prospectus which contained an untrue statement that one B was a Director of the Company. A had never heard of B and therefore the statement was immaterial from his point of view. A's claim for damages in this case was dismissed because the untrue statement had not induced 'A' to buy the shares.

Mere silence is not fraud:

Ordinarily silence does not amount to a representation. There are certain exceptions to this rule. It is the duty of a party make certain disclosures in contract **uberrimae fidei (contract of utmost good faith)**. Non-disclosure in such a case would be treated us fractulent. Some examples of such contract are: contract of insurance to take shares in company, family settlement, contract of marriage

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Check Your Progress Questions

5. Define Fraud ?
6. What is the distinction between Fraud & Mis-representation?

(Space for Hints)

etc. The following are exceptions of the general rule that silence does not amount to Fraud.

(i) Insurance contracts :

In Insurance contracts all the material facts should be communicated to insurer. So, non-disclosure would vitiate the contract. Thus, in a life insurance contract. If the assured declares that he is not suffering from a particular disease while, though unknown to him, he was in fact suffering from it, the insurance contract would be liable to be set aside.

(ii) Family settlements :

The duty of full disclosure has to be observed in the case of family settlements. Otherwise the contract would be liable to set aside.

(iii) Contracts for allotment of shares in company :

The companies Act sets out certain items which must be contained in a prospectus and thus requires a full disclousre of all materials facts.

(iv) Parent and Child :

The relationship of parent and child imposes on the parent a duty of disclosure while dealing with a child who has recently come of age.

(v) Guardian and Ward :

There is fiduciary relationship as between guardina and ward for a guardian is in the place of a parent. So, they have a duty to disclose all the material facts of a contract.

In **Gordan Vs. Gordan (1817)** a secret marriage not disclosed by one of the parties to the family arrangement was held sufficient to entitle the other party to set aside the family settlement. The companies Act sets out certain items which must be contained in the prospectus issued by the company, and requires a full disclosure of all material facts.

Pickering vs. Dowson: Where the owner of a house being conscious of a defect in a wall, plasters it up and papers it over and then sells it, there is an active concealment within the meaning of the section and the said contract can be avoided.

Distinction between Misrepresentation and Fraud

In both cases, there is a mis-representation of fact which includes the promisor to enter into a contract. Misrepresentation differ from fraud in the following aspects.

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(i) A false statement made with an intention to deceive the other party to a contract is fraud, whereas a false statement without any intention to deceive is called misrepresentation. Misrepresentation is innocent, fraud is willful or deliberate.

(ii) In case of misrepresentation, the person making the suggestion believes it to be true, while in case of fraud, he does not believe it to be true.

(iii) In the case of misrepresentation, if the aggrieved party had the means of discovering the truth with ordinary diligence, he cannot avoid the contract. **But** , in case of fraud, where there is active concealment, the contract is voidable even though the party defrauded had the means of discovering the truth.

(iv) In case of fraud, the aggrieved party has the right to claim damages in addition to his right to rescission of contract. But, in misrepresentation, the aggrieved party can rescind (avoid) the contracts or sue for restitution (sec.64), but he cannot sue for damages

(v) Fraud may amount to an offence of cheating. It is a criminal act; whereas, misrepresentation only gives a right to avoid a contract.

Remedies:

Section 19 of the contract Act deals with voidability of agreement without free consent and lays down as follows: When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract whose consent was caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true.

i) Fraud or wilful misrepresentation gives rise to an independent action in tort (civil wrong) entitling the aggrieved person to claim damages. The aggrieved party is also entitled to repudiate the contract only but not to claim damages except in the following cases; a] where an agent in good faith believes that he has the authority, the agent is liable in damages even though he is only guilty of innocent misrepresentation. (b) Where there is a mis-statement in the prospectus of company c] where there is negligent representation made by one party to another, between whom there is confidential relationship.

ii) In the case of innocent misrepresentation or fraud the contract is voidable, and the aggrieved party can rescind the contract, on the ground of absence of free consent. In both the cases, repudiation of contract is not possible unless restitution is possible.

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iii) In both the cases, the aggrieved party can defend an action against him for damages.

iv) In both the cases, the aggrieved party can resist a suit for specific performance of the contract.

v) In both the cases, since the contract is only voidable, the party aggrieved can, if he so chooses affirm the contract and enforce it against the other party.

5.6 MISTAKE

A mistake is called an error in Consensus. Mistake is of two kinds. (a) mistake of fact, and (b) mistake of law. Mistake of fact may be either (i) mistake of both the parties i.e., mutual or bilateral mistake or, (ii) mistake of only one party i.e., unilateral mistake.

Mistake of fact 1. Mutual or bilateral mistake. According to section 20 of the Indian Contract Act where both the parties to an agreement the agreement is void". In case of mistake there is no consensus ad idem, because one of the parties intends to make an agreement, on one set of terms while the other intends to do on another, and so there can be no contract. An agreement induced by a mistake of fact is void, if (1) both the parties to the agreement are mistaken and (2) the mistake is as to a fact essential to the agreement.

For example, if A agrees to buy from B a certain horse and it turns out that the horse was dead at the time of agreement but both parties were ignorant of the fact the agreement is void. But an enormous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact. Let us illustrate this point. A buys an article thinking that it was worth Rs. 200 while it is actually worth Rs.50. The agreement cannot be avoided on the ground of mistake. A mistake of fact in the minds of both the parties negatives consensus ad idem and the contract in such cases is void.

Mistake as to the existence of subject matter; Error in respect of that thing which is the subject matter of the agreement renders the agreement void for want of consent. The parties must agree not merely in the same words, but in the same sense. Therefore where both the parties to an agreement are under a mistake relating to the subject matter, the agreement is void. Now let us see two cases so that the point may be clear.

In **Courtier Vs. Hastie (1856) 19 E.R. 1065** two persons entered into a contract for the sale and purchase of Indian corn supposed to be on board a

particular ship bound for England. Unknown to both parties the corn was damaged and discharged at an intermediate port, even prior to the contract. Held the contract was vitiated by mistake.

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In **Scott Vs. Coulson (1903) 2. Ch. 249** a contract for the sale of a policy of life assurance was set aside on the ground that at the time of entering into the contract both vendor and the purchaser believed that the assured was alive, while as a matter of fact he was dead. In both these cases, the agreement was nothing but a phantom and there is no valid contract.

Mistake as to identity of the subject matter: It is essential that there should be consensus ad idem between the contracting parties in order to have a valid contract. If a mistake relates to the subject matter of the contract the contract is rendered void. The reason being that there is no meeting of minds as to the subject matter of the contract.

In **Raffles Vs. Wichelghaus (1864 2H & C 906),** a contract was entered into for the purchase of 125 bales of cotton to arrive by a ship called 'Peerless' from Bombay. Two ships of the same name were to sail from Bombay, one October and the other in December. The vendor intended to send the goods by Peerless sailing in December, while the purchaser intended to receive them by 'Peerless' sailing in October. In a suit by the vendor, held that the parties were under a mistake as to the identity of the subject matter and that there was no contract because the seller meant one Peerless and the purchaser meant another pearless. Therefore a mistake of both parties as to the identity of the subject matter, as where a party had one subject in his mind and the other party another, prevents meeting of minds and thereby invalidates the agreement.

For example in **Henkel V. Pape (1870) L.R. 6 Ex. 7;** where X inspected rifles in a shop. Later he telegraphed. "send three refles". The telegraph clerk by mistake transcribed the message as "send the 50 rifles". The shopkeeper sent 50 rifles and upon X's refusal to accept filed a suit for damages. Held, there was no contract. Here there is no consensus ad idem because of the mistake of a third party.

Unilateral mistake or mistake of one party: In the case of unilateral mistake, where only one party to a contract is under a mistake, the contract is not valid. Sec.22 makes it clear and provides "contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact". In certain cases the consent is given by a party under an error of mistake which is so fundamental as it goes to the root of the agreement. In all such cases the contract is void.

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In the following cases, a contract cannot be avoided by that party on account of his mistake: (1) in expressing intention by one party)2) in offering a higher price by a party to the contract, where the value is actually less; (3) as to the meaning of the trade description, where the goods are sold under that description; (4) as to his ability to perform the contract.

Mistake as to the identity of the party contracted with : It is a rule of law that if a person intends to contract with X, Y cannot give himself any right under it. A mistake as to the person with whom the contract is made may or may not render it void according to the circumstances of the case. Where X tends to contract only with A, but enters into a contract with B believing him to be A, the contract is vitiated by mistake as there is no consensus ad idem.

In **Boulton Vs. Jones 27 L.J. Ex 117** the defendants addressed written order for goods to Brocklehurst, with whom they had a running account. The order was executed by Boulton an employee of Brocklehurst who had on the day of the order, taken over Bracklehurst's who had on the day of the order, taken over Brocklehurst's business. The defendant had no notice of the fact that the goods came from Boulton. It was held that the defendants were liable for the price of the goods as they had never contracted with Boulton.

Similarly **in Cundy Vs. Lindsay (1873) 3 A.C. 4,9 one Blenkarn & Co** induced Lindsay to supply him with goods on credit which he afterwards sold to Cundy an innocent purchaser. In a suit by Lindsay against Cundy for recovery of the goods, held that as Lindsay never intended to contract with Blenkarn there was no contract between them and even an innocent buyer of the goods from Blenkarn did not get a good title and must return them or pay their price.

But a different view was taken in **Phillips Vs. Brooks Ltd, (1919 2K.B. 243).** A distinction was drawn between a persons identity and his attributes and a mistake about the latter has been held not to avoid the contract. Mistake as to identity of the party arises only when a person bearing a particular identity exists within the knowledge of the plaintiff.

The facts of the above case are as follows: A fraudulent person N entered a jeweller's shop and selected certain jewels, which the jeweler was prepared to sell. N drew and signed a cheque pretending to be one G, a gentleman with credit. N was allowed to take away the jewels in exchange for that cheque. Held that there was no mistake as to identity of the person and hence the contract was not void but that it was vitiated only by fraud and hence voidable.

The decision held in the case of **Ingram Vs. Little (1961) I.Q.B. 31** considerably changed the view held in **Phillips Vs. Brooks.** In this case three

ladies, the joint owners of a car advertised for sale. A person called at their house and offered to pay an acceptable price. But when the pulled out a cheque book the ladies told him that the deal was over as they would not accept a cheque. He then persuaded them to believe that he was one Hutchinson, a leading businessman and quoted an address and telephone number. On verification of particulars from the directory the ladies gave him the car for a cheque. He resold the car to the defendant and absconded. The cheque proved worthless and the plaintiffs sued the defendant for the car or its value. Here the court held that as there was mistake as to identity the contract was void and that the car remained as the property of the plaintiffs.

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But this artificial distinction between "identity" and "attribute' has now been rejected by the Court of Appeal in **Lewis Vs. Avery (1971)3 WLR 603 A, where Lord Denning M.R.** said "that it is wrong that an innocent purchaser should have his title depend on such a finements". The fact of the case are as follows; a car was taken away for a cheque by a person who posed himself to be and showed the identity car of a well known television actor and sold it to an innocent purchaser before the fraud was discovered. It was held that the seller had been intending and did contract with the person physically present. It was only a case of fraud.

Mistake as to quality of promise

It a party to a contract is under a mistake as to the quality of promise the contract is under a mistake as to the quality of promise the contract is void. If the mistake a bilateral and because of the mistake the thing does no possess the quality bargained the contract is void. Mistake as to the quality of the subject matter must be distinguished from mistake as to the quality of the promise. No one can complain that he was under a mistake as to the quality of the subject matter of the contract. The law does not cast a duty upon the seller to point out defects in the goods he is selling. The maxim is caveat emptor (let the purchaser beware). Therefore, a contract is not void if there is a mistake in respect of the quality of subject matter. **Smith Vs. Hughes (1871) L.R. Q.B.597; A** sold oats to B by sample and B taking that they were old oats. It was held that B was bound by the contract, as the parties had in their mind the identical oats at the time of entering into the contract, In **Ward vs. Hobbs (1878) 4 A.C. 13**: H sold to W, "with all faults" some pigs which, to his knowledge, were suffering from fever. He did not disclose that fact, and the rule is "Caveant emptor" But to this rule of caveat emptor there is only one exception. The rule is not applicable to contracts of unberrimae fide or contracts of utmost good faith. "The best example

Check Your Progress Questions

7. What is meant by mistake of law?
8. Define Uni-lateral mistake of fact?

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for this type of contract is contract of insurance. In case of contracts of insurance the assured has to make frank disclosure of the facts known to him and essential for the purpose of enabling the other party to give free consent. A mis-statement or concealment of a material fact will render the contract void. The other best example is contracts for the allotment of shares. In such cases utmost good faith must be exercised by those who issue prospectus inviting the public to subscribe to the shares of the company. Suppose the person who applied for shares is induced by wrong statements in the prospectus, then he is entitled to avoid the contract. Even in cases of guarantee, the creditor is bound to disclose to the surety all the material facts known to him about the principal debtor.

Where a contract made was the one intended but it is different from the contract which one of the parties would have made if he was aware of all the facts, the contract is not void on the ground of mistake.

The leading case on this point is **Bell Vs. Lever Brothers Ltd., (1932} A.C. 161**. Bell was the Managing Director of Niger Co., under a contract of service for five years. After three years, the company was amalgamated with another company and the services of Bell were prematurely terminated. But Bell had committed certain breaches of duty, during his directorship. Lever Brothers however did not know about those breaches and agreed to pay 30,000/- pounds as compensation for prematurely terminating his appointment. Subsequently, when they came to know of the misconduct of Bell which would have entitled them to dismiss him, without payment of compensation, they sued for the recovery of 30,000/- pounds. It was established that both the parties were under the impression that the contract was one which could be terminated only by payment of compensation. The question was whether this common mistake would render the contract void and so entitle Lever Brothers to recover the amount paid by them. The House of Lords held that the contract was valid.

Mistake as to the nature of the contract: The signing of a contractual document generally implies consent so that the parties signing it are bound by it. But where the signature of one of the parties to the contract was obtained by misrepresentation, then the contract could not be enforced against the party, whose signature was no obtained. In **Foster Vs. Mackinnon (1859) L.R. 4 C.P. 704**, an old illiterate man was made to sign a bill of exchange, by means of a false representation that it was a guarantee. It was held that he was not liable under the contract.

The same principle was laid down in **Carlisle and Cumberland Banking Company Vs. Bragg (1911) I.K.B. 489**. A dealer sold a car to H on her purchase

terms and asked K to sign a document representing that it was a release not while it was in fact an indemnity requiring K to pay if H committed default. The lower portion of the document was covered by other papers on the dealer's desk when K signed it. It was held that was not bound by his signature. But it is very important to note that the plea of mistake will be available only when it relates to the nature of the contract and not to the terms of the contract.

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If there is a mutual mistake as to the price of the subject matter the agreement is void. If the parties are under a mistake as to the title of the subject-matter the contract is void. If the seller is selling a thing which he is not entitled to sell and both the paries are acting under a mistake, a contract is void.

In **Corper Vs. Phibbs (1857) L.R. 2 H.L. 149)** a person took a lease of land which unknown to either party already belonged to him. Held that the lease was void.

Mistake of Law

The effect of mistake of law on a contract is expressed by the maxim **ignorantia Juris non excusat** i.e., ignorance of law is no excuse. It is a citizen's business to know by taking professional advice or other wise so much law as concerns him for the matter he is transmitting. Ignorance of law does not affect agreements nor excuse from the legal consequences of particular acts. A man cannot go back upon what he has deliberately done, merely because he alleges that he acted under a misapprehension of law. The legal presumption is that every man of reasonable understanding knows the law when the knows the facts. The presumption is founded upon reasons of public policy.

It is a well settled rule that ignorance of law is no excuse and a party cannot be allowed to get any relief on the ground that he had done a particular act in ignorance of the state of law. Whatever mistakes therefore a man may make in the law relating to his contract, they will be binding unless fraud or imposition be practiced upon him. If a person enters into a contract by making a mistake of law through the inducement of another; whether innocent or otherwise, the contract may be avoided.

Mistake of law may be of three kinds: 1) Mistake of foreign law 2) Mistake of the law of the land 3) Mistake of rights of private individuals. If a person pleads ignorance of foreign law it will have the same effect as mistake of fact.

Private right of ownership is a matter of fact. It may also be the matter of law. In the case of private rights which are mixed questions of law and fact a mistake concerning them has the same effect as a mistake of fact. Where parties

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to the contract were under a mutual mistake and misapprehension as to their relative and respective rights the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. In **Cooper Vs. Phibbs (1867) L.R. 2 H.I. 149,** A in ignorance of his own rights took a lease of certain fishing rights belonging to him (A) from B thinking that they were B's. It was held that ignorance of private right has the same effect as ignorance of fact and therefore, was a ground for avoiding the contract.

It was held in **Seth Gokuldas Vs. Murlh, 3 Cal. 602** an erroneous belief that a judgment debtor is bound by a law to pay interest on the decretal amount though no interest has been awarded by the decree, is a mistake of law and a contract grounded on such belief is not voidable. According to section 24 of the Indian Contract Act "a contract is not voidable because it was caused by a mistake as to any law in force but a mistake as to law not in force has the same effect as a mistake of fact".

Remedies

The aggrieved party in case of mistake may repudiate the contract if it is executory and resist an action to specific performance. If a contract is executed the other party who received any advantage under the contract will be compelled to restore it or to make compensation for it as soon as the contract is found to be void. As per section 72 of the Indian Contract Act, a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it.

Sales Tax Officer Vs. Kanhaiyalal (9. S.T. cases 747). It was held by the Supreme Court that if either mistake of law or fact is established the party who paid the money is entitled to recover it and the party who received the sum is bound to repay or return irrespective of any consideration whether the money had been paid voluntarily or not. It was contended for the appellant sale tax Officer, that as the tax has been voluntarily paid and the amount paid to State was not retained but spent the respondents were estopped from claiming back the amount. It was held that under the plain terms of section 72 the citizen would be entitled to recover the tax paid by him to the state under a mistake of law.

Rectification: The courts will not rectify an instrument on the ground of mistake unless it is shown that there was actual concluded contract antecedent to the instrument sought to be rectified, and that the contract is inaccurately represented in the instrument. The leading case on this point **is Haji Abdul Rahman Alarakhia Vs. The Bombay and Persian steam navigation Co, (1892)**

16, Bom 561. The plaintiffs chartered a ship from the defendant co, to sail from Jeddo on the 10th August, 1892 fifteen days after the Haj. The ship was intendedto transport pilgrims returning to Bombay. The 19th July 1892 and not the 10th august 1892, infect corresponded with the fifteenth day after Haj. When the mistake was found out the charterers sued the defendant company for rectification of contract. It was held the agreement was one for the 10th August 1892, and the mistake was not mutual buton the plaintiff's part only; therefore that there could be no rectification. The court further observed that even if both parties were under a mistake, the court cannot rectify the instrument as the date, was a matter materially inducing the agreement. So the whole instrument is to be cancelled.

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Mistake as to the written contract (Non Est Factum):

The plea of 'non est factum' permits one who as executed a written document in ignorance of its character to plead, that not withstanding the execution, it is not his deed in contemplation of law. Where a party who has executed a written document, was under a mistake not only with regard to the contents, but also to the essential nature of the contract he can plead non est factum. (it is not my deed). It is explained in the legal maxim of "Scriptum predictum non est. factum" (the writing is not my deed).

A party to the instrument is not permitted to plead that he did not know (a) what the document meant, or (b) what the document said. If the party signs the instrument then, ordinarily he is bound by it and by all its terms even though it contains provision (a) whose meaning he misunderstood or (b) of whose presence in the instrument he was unaware. One of the exceptions to this rule is that the plea that the instrument is not in truth, his deed available to the deceived or mistaken party.

The plea that the instrument is not his deed is available in the following cases: 1) Where the deed is forgery 2) Where the deed though executed by him, is an instrument different in kind from that which he supposes to be. The leading cases on these points are as follows:

In **Throughgood's case (1854, 2 C.R.9),** an illiterate man executed a deed which was described to him as a release of arrears of rent, but in fact it was a release of all claims. It was held that the deed was void.

Foster Vs. Mackinnon (1869) LR. 4CP 704 Mackinnon, an old man, signed his name on a paper which he was informed was a document of guarantee, intact, the document turned out to be a bill of exchange of sterling 3,000, and it was subsequently endorsed for value to Foster. The court observed Machinnon could plead successfully the defence of non est factum as against the other party to the contract.

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Carlisle and Cumberland Banking Co Vs. Bragg 1911 K.B. 489, Bragg signed a paper which he was told by his friend Rigg was copy of a paper concerning an Insurance matter previously signed by him. But actually it was a continuing guarantee upto sterling 150 of Rigg's current account with the bank. It was held that he could plead non est factum.

It may be noted that the plea of non est factum is available only when the mistake is as to the essential nature of the contract and not as to the terms or contents of the contract. If the signature is mistaken only as to the contents of the documents, he is not protected by the plea of non est factum. In **Howeston Vs. Webb (1908 1: Ch 1)** the character and class of the document was that of conveyance of property and webb know this. What he did not know was that the contents of the dead made it a conveyance by way of mortgage. It was held that the plea of non est factum is not available to him.

Further, where a person is negligent in signing a document he cannot plead non est factum for no man may take advantage of his own wrong. To understand this point we can refer the case, **Gallie Vs. Lee (1971 AC 1004).** In this case, the plaintiff, an elderly widow intending to make a gift of a house to her nephew gave the title deeds of the house so that she could borrow money on the security of the property. Subsequently she was requested by the defendant to sign a document which he represented to her that it was a gift deed to Wally (her nephew). As she had broken her spectacles, she signed the document without reading it. The document was in fact a deed conveying the house to the defendant, who subsequently mortgaged the house to a building society. The court observed that her plea of non est factum failed because she had intended to effect a transfer of the house so that the transferee could raise money on it. So her transfer of the property to defendant was not therefore of a totally different character than a transfer to her nephew. Therefore the building society could enforce the mortgage.

Error in Verbis and Error in Causa : In a contract the flaw in consent may be due to the following causes: Error in verbis, error in causa or error in consensus.

If a mistake is committed in reducing a contract to writing it is called error in verbis and it gives a right to the parties to rectify the contract, in accordance with the agreement between the parties but does not render the contract void. If there is error in the consenting minds of the parties to the contract and that error is the result of mistake then it is called an error in consensus. An error in causa may result from coercion, fraud, undue influence or misrepresentation. If the party to a contract is induced by the other party to enter into a contract

under coercion, fraud etc., then it is known as error in cause. Let me illustrate these errors.

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'X' signs a promissory note in favour of Y, Y represents to X that he is only signing as a witness on a receipt, but actually his signature was obtained on a promissory note. In this case though there is the outward semblance of consensus there is really no consent at all. If A had known the truth he would not have signed at all. Therefore where the consent is totally absent in the eye of law due to mistake, the error in consent is called error in consensus. In such cases the contract is void. In the same example, if A had signed the promissory note under a threat of being killed by B if A refused to sign the promissory note, it is not possible for A to say that he did not know what he was signing, but he can only complying that he did not have executed the promissory not if he was not threatened by B. In this case there is not total absence of consent but it is a case of an error in the cause that induced him to sign. This error is called error in cause. In cases of error in cause the contract is only avoidably, In some cases an error in consensus and an error in causa may exist together. In such cases the contract is void. For every contract there must be consensus ad idem. The parties to the contract must think about the same subject matter. In the same sense and voluntarily agree for the agreement. Therefore incase of error in consensus there was not at the relevant time any real agreement or common intention between the parties or their minds had not met. Where there is consent but the consent is not free, as in the case of misrepresentation, coercion, fraud, then it is known as 'error in cause'.

Error in consensus is of two kinds, according to whether the misun derstanding relates to the terms of the contract or to the identity of the parties. A person may make a contract either under a mistaken as to the matter agreed upon or as to person with whom he is dealing. In case where a person makes a contract under a mistake as to the matter agreed upon, there is no consensus as to the nature of the obligation to be constituted. In case where a person makes a contract under a mistake as to the person with whom he is dealing, there in no consensus as to the persons between who those obligation are to exist. The rule that a contract is invalidated by error in consensus as to its terms applies only to mistake as in express terms and has no application to terms implied by law.

Case laws on error in consensus

Barrow Lane & Ballard Ltd. Vs. Phillips, (1929 I.K.B. 574): The contract was for the sale of a specified parcel of 7000 bags of nuts of which unknown to the parties 109 bags has disappeared at the timeof making the contract. Held, that the contract was void.

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Galloway Vs. Galloway (1934, 30 TLR 531): A and B believing themselves married agreed to be separated. An agreement to that effect was entered into under which the husband agreed to pay a weekly allowance to the wife. Later it was transpired that they were not married. In an action by the 'wife' for arrears of allowance it was held that the agreement was void because there was a mutual mistake on a point of fact which was material to the existence of the agreement.

Sheikh brothers Vs. Ochaner (1957 A.C. 136). The appellants contracted to grant a license to the respondent to cut, process and manufacture all sisal grown in a particular estate in Kenya of which they were the lessees. In return, the respondent deposited a certain sum of money and undertook to deliver to the appellants 50 tons of sisal fibre manufactured by him each month. The estate was in fact not capable of production such a quantity. It was held that the parties had both contracted under a mistake of fact essential to the agreement, namely, that the estate was capable of yielding that amount of sisal and that the contract was void.

Manbhari Vs. Pt. SriRam (AIR 1936 All 572) An ignorant young man, who had just attained his maturity and whose mind was clouded and affected by hemp smoking, sold his property for a grossly inadequate consideration to his guru. The court set aside the sale on the ground of undue influence.

In the case of a mistake in the expression of the contract (error in verbis) the remedy is the rectification of the instrument.

5.7. SUMMARY

From this chapter, we hope that you have understood the concept of free consent to a contract. Free consent is an essential requirement of a void contract. This chapter clearly describes the legal rules relating to free consent and flaw in consent to a contract. The important topics of flaw in consent (i.e) coercion, undue influence, fraud, Misrepresentation, mistake of law and mistake of fact are elaborately discussed with many case laws and illustrations and the distinction between coercion & undue Influence; Fraud & Misrepresentation are given for your easy understanding. Moreover, this chapter clearly explains the distinction between English law and Indian law in this subject.

5.8. KEY WORDS

1. Aggrieved — A person who was suffered a grievance or wrong

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2.	Acquiescence	-	Assent to an infringement of rights, either express or implied from conduct, which may result in the remedy itself becoming unavailable.
3.	Coerce	-	Force someone to obedience
4.	Duress	-	Causing or threatening to cause bodily violence or imprisonment with a view to obtain the consent of the other party to the contract.
5.	Discretion	-	A man's own judgement as to what is best in a given case as opposed to a rule governing all cases of a certain kind.
6.	Diligence	-	
7.	Damages	-	Compensation for injury or loss the pecuniary satisfaction awarded by a court by the plaintiff.
8.	Menace	-	Danger
9.	Rescission	-	Rescission is where a contract is put or end to buy the parties or one of them.
10.	Subtle	-	Delicate and fine; crafty nicety of meaning
11.	Seclusion	-	To keep (one self) a part
12.	Unconscionable	-	Unequal

5.9 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **5.1**
	Question No.2	...	Refer Section No. **5.1**
	Question No.3	...	Refer Section No. **5.2 & 5.2.2**
	Question No.4	...	Refer Section No. **5.3**
	Question No.5	...	Refer Section No. **5.5**
	Question No.6	...	Refer Section No. **5.5**
	Question No.7	...	R efer Section No. **5.6**
	Question No.8	...	Refer Section No. **5.6**

5.10 EXERCISE QUESTIONS

A. Short answer Questions

1. When is consent said to be induced by coercion ? What is its effect?
2. Distinguish between coercion and Undue Influence

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3. What is meant by unconscionable bargains?
4. A mere silence as to facts is no fraud' – Discuss.
5. Write shorts on
   a) Mistake as to Identity of the parties
   b) Mistake of law
   c) Non est factum.

B. Long answer questions

1. "Two or more persons are said to consent when they agree upon the some thing in the some sense" – Explain this statement and give illustration
2. Discuss the law relating to the effect to mistake on contracts? And state the difference between mistake of law & fact?
3. What id misrepresentation and distinguish it from fraud? Can silence amounts to representation?
4. What is a contract said to be induced by "Undue Influence"? when is a party deemed to be in a position to dominate the will of another? What is the effect of undue Influence on a contract?
5. What remedies are available to a person induced to enter into a contract by a) misrepresentation b) Fraud? And the difference between coercion and Undue Influence?

UNIT – 6
LEGALITY OF OBJECT

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INTRODUCTION:

The next ingredient of a valid contract is that it's consideration and object must be lawful. A contract must not only be based upon mutual consent of parties but must also have a lawful consideration and object. Even if all the other requirements of a valid contract are complied with yet, if the object of the contract is contrary to common law or unlawful, the law will not enforce it. Therefore we can note that the agreement should not be illegal or opposed to public policy. Otherwise, the contract becomes void. According to section 23 of the Indian Contract Act, an agreement of which the object or consideration is unlawful is void. Sec.23 declares that the 'object' or the 'consideration' of an agreement is not lawful in certain cases.

UNIT OBJECTIVES:

- To understand the concept of lawful object & consideration.
- To learn about the agreements opposed to public policy.
- To know the various kinds of void agreement.
- To analyse the distinction between illegal and void agreement.
- To understand the doctrine of severability.
- To study about wagering & contingent contract.

UNIT STRUCTURE:

6.1 Lawful object and consideration [Unlawful Agreements]

6.2 Agreements opposed to public policy

6.3 Void Agreements

6.4 Illegal & Void Agreements

6.5 Doctrine of Severability.

6.6 Wagering Contract

6.7 Contingent Contract

6.8 Summary

6.9 Key words

6.10 Answers to check your progress

6.11 Exercise questions.

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6.1. LAWFUL OBJECT AND CONSIDERATION: [Unlawful Agreements]

A contract is valid only if it is made for a lawful consideration and lawful object. If the consideration or object of an agreement is unlawful, then the agreement is void and unenforceable.

Sec.23 of the contract Act deals with Unlawful agreements. The word "object" in section 23 of the contract Act is not used in the same sense as "Consideration." 'Object' means purpose or design of the contract whereas consideration is the act, abstinence or promise made at the desire of the promisor. In some cases, consideration for an agreement may be lawful but the purpose or object for which the agreement is entered into may be unlawful. In such cases, the agreement is void.

For example, where money is borrowed for the purpose of the marriage of a minor, the consideration for the contract (i.e) the loan amount is lawful but the object or purpose (i.e.) Marriage is unlawful under the child Marriage Restraint Act, 1929. Here if the money-lender is aware of the object, he cannot enforce the contract.

Thus, both the object and the consideration of agreement must be lawful, otherwise the agreement would be void.

6.1.1. UNLAWFUL AGREEMENT:

Section 23 renders certain considerations and objects as unlawful.

Section 23 of the contract Act defines as follows:

(i) The consideration or object of an agreement is lawful, unless it is forbidden by law; or

(ii) It is of such a nature that if permitted, it would defeat the provisions of any law; or

(iii) It is fraudulent; or

(iv) it involves or implies injury to the person or property of another; or

[v] the court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful and is void.

Section 23 of the Indian Contract Act enumerates the different kinds of objects which are unlawful. Unlawful agreements may be classified into[1] illegal agreements [2]immoral agreements and [3] agreements opposed to public policy.

Check Your Progress Questions

1. What is an unlawful agreement?

Illustrations:

(a) A agrees to sell his house to B for Rs.10,000/-. Here B's promise to pay Rs.10,000/- is the consideration for A's promise to sell the house and A's promise to sell the house is the considerations for B's promise to pay Rs.10,000/-

(b) A promises to maintain B's child and B Promises to pay A Rs.1,000/- yearly for that purpose. Here the promise of each party is the consideration of the promise of the other party. They are lawful considerations.

(c) A, B and C enter into an agreement for the division among them gains acquired, or to be acquired by them by fraud. The agreement is void, as its object is unlawful.

(d) A promises to obtain for B, an employment in the public service and B promises to pay Rs.1,000/- to A. The agreement is void, as the consideration for it is unlawful.

(e) A promises B to drop a prosecution which he has instituted against B for robbery and B promises to restore the value of the things taken. The agreement is void as its object is unlawful.

(f) A agrees to hire her daughter to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code [XLV of 1860]

(i) Forbidden By Law:

Where the object or the consideration of an agreement is forbidden by law, the agreement is unlawful and void. An act is forbidden by law when it is punishable by the criminal of the country or when it is prohibited by special legislation or regulations made by a competent authority under powers derived from the legislature. 'Law' in this connection means the law for the time being in force in India. A simple illustration is the sale of liquor without license. The sale is void and the price is irrevocable.

Examples:

(1) 'A' promises to obtain for 'B' an employment in the public service and 'B' promises to pay Rs.1 Lakh to 'A'. The agreement is void as the consideration for it, is unlawful.

(2) 'A' and 'B' entered into an agreement to smuggle goods from Malaysia and to share the profits. Here, the object of the agreement (smuggling) is a forbidden act. So, the agreement is unlawful and void.

(3) An agreement to sub-let a telephone, in contravention of conditions is void, because it is forbidden by law.

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An agreement indirectly defeating the provisions of an act would be void. If the intention of legislature is to forbid an act in public interest, an agreement to do the forbidden act will obviously be void.

In **Haseen Bano Vs. Syed Habeeb Sayeedudin (1997), A.P.,** it was held that carrying on money lending business without registration and licence under Money-lenders Act has been held to be contrary to the enactment and, therefore void.

In **Biharilal Jaiswal Vs.CIT (1996) 1 SCC 443,** it was held that a partnership for conducting business under a Government licence granted to an individual for retail sale of country spirit which was contrary to the prohibition contained in the relevant state Excise Act was held to be unlawful and void.

(ii) If it is of such a nature that if permitted it would defeat the provisions of any law:

In Certain cases, the consideration or object of an agreement may not be an act expressly forbidden by law, but if such agreement is allowed, it would defeat the provisions of any law. Such agreement is void and unlawful. Easy illustrations are, to be bound in agreements relating to bail bonds. In criminal cases, the accused is released on bail, by furnishing surety by some honest person. It must be a voluntary act of the surety and it should not be out of an agreement. If there is an agreement between the accused and the surety that the accused would advance the surety amount and when the amount is returned to the surety by the court after trial, it must be returned to the accused, the agreement is void. Now, let us see some examples through case Laws.

Examples:

1) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate, 'B' upon an understanding with 'A', becomes the purchaser and agrees to convey the estate to 'A' upon receiving from him the price which 'B' has paid. The agreement is void as it renders the transaction, in effect a purchase by the defaulter and would defeat the object of the law. **(Mohan Lal Vs. Narain, 14 Cal 1031).**

2) 'A' was licensed under an Excise Act to run a liquor shop. The Act forbids the sale transfer or sub-lease of the license or the creation of a partnership to run the liquor shop. 'A' enter into a partnership with 'B', It was held that the agreement was void **(Nandlal Vs.Thomas).**

3) In the case of **Alexander Vs.Rayson (1936) 1 K.B. 169,** where the plaintiff let a flat to the defendant at a rent of £ 1200 per year. To reduce the

municipal taxes, he entered into two agreements with the defendant. One agreement by which the rent was stated as £ 450 only and the other by which the defendant agreed to pay £ 750, for services in connection with the flat. In a suit filed against the defendant, to recover £750, it was held that the agreement was made to defraud the municipal authorities and was void, and therefore the plaintiff cannot recover the money.

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In a recent case of **Srihari Jena Vs.Khetramohan Jena Vs. AIR 2002 Ori 195,** where a transaction for exchange of properties to be performed after the compounding of a criminal case between the parties was held to be not enforceable.

(a) Law of friendly country:

An agreement which defects the law of a friendly country would be equally void. An illustration is **Foster Vs. Driscoll (1928) All, ER Rep.130,** Where the agreement was to buy whisky in Great Britain and to smuggle it into the United states against the law of that country. The court of appeal held the agreement to be illegal and void since it involved the commission of an offence in a foreign and friendly country.

(b) Agreement to evade taxes:

An agreement to evade taxes is also void. In **Ram Sewak Vs.Ram Charan AIR 1962 ALL 177,** is also void. An agreement between the partners of a firm to conceal income in certain respects in order to evade income tax has been held to be unlawful.

(c) An agreement to extend the period of limitation laid down by the Limitation Act is invalid. The Limitation Act, 1963 provides a period of 3 years for a suit on a promissory note.

For Example:

'A' executes a promissory note in favour of 'B' and agrees that 'B' may bring a suit within 6 years. 'B' brings a suit after 5 years from the execution of the pro-note. Here, the agreement is unenforceable. Because of it the agreement is enforced, the law of Limitation will be defeated.

(iii) Agreement which is fraudulent:

An agreement which is made for a fraudulent purpose is void. Where the object of the agreement is to defraud or cheat someone; or where the contracting parties agree to impose a fraud on a third person, the agreement is unlawful and is void.

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For example:

1.'A','B' and 'C' enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. This agreement is void, as its object is unlawful.

2.'A', being an agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for 'B' a lease of land belonging to his principal. The agreement between 'A' and 'B' is void, as it implies a fraud by concealment, by 'A' on his principal.

3. 'A' agrees to pay Rs.10,000/- to 'B' in consideration of 'B' taking an ostensible transfer (Benami transfer) of A's entire unmovable property of defeat and delay A's creditors. Here, the agreement is fraudulent and therefore it is void.

4. An agreement to defraud the revenue authorities is another typical example.

(iv) Injurious to person or property:

The object or consideration of an agreement will be unlawful and void if it involves or implies injury to the person or property of another. 'Injury' means wrong, harm or damage and the term property includes both movable and immovable property.

For example:

1) 'A' promises to pay Rs, 5,000/- to 'B' in consideration of 'B' causing hurt to 'C'. This is a void agreement as it involves injury to a person.

2)'A' agrees to pay Rs, 10,000/- to 'B', an editor of a newspaper to publish a defamatory article against one 'D'. Here, the agreement is void as it involves injury to the person of 'D'.

Thus, An agreement between two person to injure the person or property of another is unlawful.

In **Ram saroop vs. Bansi Mandar,(1915) 42 cal, 742,** where a person borrowed a sum of hundred rupees and executed a bond promising to work for the plaintiff without pay for a period of two years. In case of default, the borrower was to pay ex-orbitant interest and the principal amount at once. The court held that the contract was void as it involved injury to the person.

Likewise, an agreement to commit a crime or a civil wrong. For example, to assault or beat a person, or to deceive him or to publish a defamatory statement against him, all fall in this category.

(v) If the court regards it as immoral:

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The law does not allow an agreement tainted with immorality to be enforced. Where the consideration and object of an agreement is such that the court regards it as immoral, and it is void. So, every agreement, the object of which is immoral, is unlawful. The term 'immoral' depends upon the standards of morality prevailing at a particular time, in a particular society and as approved by the courts. But, certain kinds of acts have been regarded as immoral, Since times immemorial in all societies.

For example:

'A' agrees to let her close relative to 'B' for concubinage. The agreement is unlawful being immoral. In **Baivijli Vs. Nansa Nagar (1885) Bom 152,** a married woman was given money to enable her to obtain divorce from her husband and then to marry the money-lender. It was held that, the agreement was immoral and the money-lender could not recover the money.

In the case of **sumitra devi Vs. Sulekha kundu, A.I.R. 1976, Cal, 197,** the court held that, 'an agreement between a husband and wife for future separation is unlawful'.

In **pearce Vs. Brooks (1865),** where a firm of coach builders hired out a carriage to a prostitute knowing that it was to be used for the prostitution. It was held that the coach builders could not recover the rent amount, as the agreement was illegal.

The Lordships of the Supreme Court in **Gherulal Farakh Vs. Mahadeodas Maiya (A.I.R. 1909 S.C 781)** have laid down the doctrine of immorality, in the following terms. "The learned authors confined its operation to acts, which are considered to be immoral according to the standards of immorality proved by courts. The case law both in England and India confines the operation of the doctrine of immorality. To cite some instances, settlement in considerations of concubinage, contracts of sale or hire of things to be used by a prostitute for purpose incidental to her profession, agreements to pay money for future illicit co habitation promises in regard to marriage for consideration or contracts facilitating divorce are all held to be void on the ground that the object is immoral."

In **Wilson Vs.Camely 1 1908 1KB 729 (C.A)** It was held that agreement between a married man and a woman who knows him to be married, to marry one another after the wife's death is void as being repugnant to morality and public policy.

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According to English law, a promise made in consideration of past illicit cohabitation is not enforceable on the ground that past consideration is no consideration, but the view taken by Indian courts differs from the view taken by English courts. In **Namperumal Vs. veeraperumal. 59 I.I.L.J. 596,** it was held that past consideration being a valuable consideration, a promise made on account of past cohabitation is valid and enforceable. But it is very important to note that if the cohabitation is of adulterous kind, even though it is past, the promise cannot be enforced on the ground that adultery is an offence under the Indian Penal Code. According to English law and Indian law separation between the husband and wife is not considered as good morals. An agreement between the husband and wife for future separation is immoral. Both Indian law and English law are on this point. Moreover, bargains to bring a suit for divorce or to make no defence to such a suit are also unlawful.

vi) Public policy:

An agreement is unlawful if the court regards it as opposed to public policy. Any agreement which tends to promote corruption or injustice or is against the interest of the public is considered to be opposed to public policy. A contract which is opposed to public policy cannot be enforced by either of the contracting parties.

6.2. AGREEMENTS OPPOSED TO PUBLIC POLICY:

The term 'public policy' cannot be defined with any degree of precision. Public policy means certain principles framed for public interest. It is the principle of law, which holds that no subject can lawfully do that which has a tendency to be injurious to the interest of the public, or which is against the public good or public welfare. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public interest has varied from time to time.

The doctrine of public policy is only a branch of common law and is governed by precedents. Public policy is a vague and elastic term. Public policy has been described as "Untrustworthy guide" and "Uncertain" one.

In the words of Burrough.J, "Public policy was a very unruly horse. When once you get astride it. You never know where it, will carry you"**[Richardson Vs. Mellish (1824)].**

The understanding principle of public policy is no one can be permitted to do that which is likely to affect the interest of public at large. This principle of public policy is explained in the legal maxim of **'Ex Dolo Mold Non Oritur**

Actio'(ie) No court will lend its aid to a man who found his cause of action upon an immoral or illegal act.

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Position in England:

In Janson vs Driefontein consolidated Mines (1902) A.C 484,'Lord Davey' observed that 'public policy is always an unsafe and treacherous ground for legal decisions, and that categories of public policy are closed, and that no court can invent a new head of public policy.' However, this does not affect the application of the doctrine of public policy to new cases within its recognized bounds.

Position in India:

In India, the judicial opinion is unanimous that the various heads of public policy are not closed. The court can invent new heads of public policy in the interest of the changing conditions of the society but in the case of **Cherulal vs. Mahadeodas (AIR 1959, SC 781)**, the Supreme Court observed that it is advisable in the interest of stability of society not to make any attempt to discover any new heads of public policy in these days.

The agreements which tends to be injurious to the public or against the public good is void as being contrary to public policy. The last clause in sec 23 refers to contracts in which the consideration or object of an agreements is unlawful as "the courts regards it as opposed to public policy". Public policy has not been defined in the Act. It is left to the court to regard whether in the circumstances of a particular case, the object or consideration is opposed to public policy. In such cases courts they always been following the rules of common law as established by decided cases.

Now Let us see some case-laws:

In **Montefiore Vs Menday Motors Components company(1918,2 K.B. 241)**. It was held that the agreement containing a term to influence a high official was against public policy.

In **Central Inland Water Transport Corpn Vs. Brojo Nath Ganguly (A.I.R. 1986, S.C . 1571)** a one-sided service rule of a Government company was held to be in valid on the touch stone of 'public policy' as enacted in section. 23.

Now we shall discuss some of the agreements opposed to public policy.

(i) Trading with Alien enemy:

> **Check Your Progress Questions**
>
> 7. "Agreement opposed to public policy is void" – Explain

Alien enemy is a person whose country is at war with union of India. An agreement made with an alien enemy at the time of war is illegal and opposed to

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public policy and it cannot be enforced in a court of law. It is a well-settled principle of public policy that one should not trade with an alien enemy without the government permission. Likewise, an agreement made at the time of peace will be suspended during the war times. Such contracts are either suspended or dissolved according to the intention of the contracting parties.

(ii) Interference with Administration of Justice:

Where the object of an agreement is to interfere with administration of justice, then the agreement will not be enforceable in law and is unlawful since it is opposed to public policy. In **GULAB CHAND Vs KUDILAL (AIR 1959 M.P. 151)**. It was held that if a contract had been concluded between a judge and a litigant in relation to a matter Subjudice before him, it would have been void as opposed to public policy. In such cases, the contract would have had a tendency to divert the course of justice and create a conflict between duty and interest.

Interference with the administration of justice may be in any of the following forms,

(a) Interference with the course of justice:

An agreement which obstructs the ordinary process of justice is unlawful and opposed to public policy. Thus, an agreement for using improper influence of any kind with the judges or officers of justice is unlawful.

(b) Stifling prosecution:

It is in public interest that criminals should be prosecuted and punished. Hence, an agreement not to prosecute an offender or to withdraw a pending prosecution is void. Such an agreements are called as agreements to stifle prosecution.

Agreements for stifling prosecution are void and unenforceable in a court of law on the ground that they are opposed to public policy. "No court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of judges and put it in the hands of private individuals". When an offence has been committed, the guilty man must be prosecuted.

According to Indian law, the Criminal Procedure Code divides offences into compoundable and non-compoundable. Where the offence is of a compoundable nature, then the parties are entitled to compromise the matter. Even in cases where the offences are compoundable there are distinctions namely,

(1) Offences which are compoundable with the permission of the court.

(2) Offences which are compoundable without the permission of the court.

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In cases where the offences are compoundable without the permission of the court the parties are entitled to compromise the matter out of the court or before the court by way of an agreement. But in cases where the offences are compoundable only with the permission of the court the parties may compromise the matter, by recording the compromise before the court. But where the offences are non-compoundable an agreement made for the purpose of compounding it or stifling the prosecution is unenforceable.

Amrikhan Vs Amri Jan (1898,3 C.W.N. 50), 'A' agreed to execute a KAPALA of certain lands in favour of 'B' in consideration of 'B' abstaining from taking criminal proceeding against 'A' with respect to an offence of simple assault which is compoundable: it was held that the contract was not against the public policy and that the same could be enforced. The Supreme Court of India considered at length the effect of an agreement between parties with regard to offences of non-compoundable nature in **Narasimharaja Vs Gurumurthi Raja (A.I.R 1963) (S.C 107)**. The parties to a pending criminal case charged under sections 420,465,468 and 477 read with section 107 and 120 B of the Indian Penal Code entered into an agreement to refer the matter to arbitration agreement was invalid under section 23 of the Indian Contract Act as being opposed to public policy.

In Bhowanipur Banking Corporation Ltd Vs.Durgesh Nandani Dassi AIR 1941, PC 95, the privy council held that where a mortgage was executed by the respondent as a part of the consideration for a promise by a bank to withdraw criminal proceedings instituted by it against the mortgagor's husband and the bond was held invalid as it is opposed to public policy.

(c) Maintenance and champerty:

Maintenance means an agreement to promote litigation by a person in which he has got no interest of his own. In other words, it is an agreement in which a person promises to give financial assistance or otherwise, to enable tie to bring or defend legal proceedings and to maintain a suit in which he has no interest. It is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest. Maintenance tends to encourage litigation which is not bonafide but speculative. It is considered as a civil wrong (tort) than a contract.

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For example:

'A' offers to pay Rs. 10000/- to 'B', if' B' will sue 'C'. A's motive is only to annoy 'C'. Here, this agreement between 'A' and 'B' is a maintenance agreement.

'**Champerty**' means an agreement whereby one party promises to assist another with money or otherwise in recovering money or property by a suit, in consideration of his receiving a share in that in that property so recovered.

Champerty is the maintenance of a litigation, for a share in the proceeds, of the legal action.

For Example

'A' agrees to pay the expenses to 'B', if 'B' sues 'C',and 'B' agrees to give 'A', one –third of any proceeds received by 'B' as a result of the said legal action. This is a champertous agreement.

Under English law, both maintenance and champerty agreements are void, illegal and un enforceable.

But, Indian law does not make such agreements, absolutely void. In India, agreements by way of maintenance and Champerty are not necessarily void unless there are elements of moral turpitude or unconscionable conduct proved in connection with such agreements. If the object of the contract is to assist the party involved in a litigation, in making a reasonable claim arising out of a contract and then to have a fair share in the profit, the contract is not opposed to public policy and is valid.

The validity of such agreements mainly depends upon the discretion of the courts. If the quantum of share is reasonably high comparing with the service rendered, then the agreement will be treated as unlawful.

In **Raja Venkata Subhadrayamma Guru Vs.Sree Pusadath Venkatapath *Raju(*MAD 230.P.C)** the Privy Council held that champerty and maintenance are not illegal in India,and that courts will refuse to enforce such agreements only when they are found to be extortionate and unconscionable, and not made with the bonafide object of assisting the claim of the person unable to carry on the litigation for himself. In other words only those agreements which appear to be made for the purpose of gambling litigation and for injuring or oppressing others, by encouraging unholy litigation that will not be enforced, but not all agreements of champerty or maintenance.

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iii) Agreements in restraint of parental rights:

An agreement in restraint of parental rights is opposed to public policy and thereby void. A parental right is considered by law to be so important and so fundamental that it cannot be restricted or taken away by any agreement. According to law, it is the father who has got the right of guardianship of his infant child till he attains the majority. Next to the father, the mother has got the right of guardianship. Born in India and England, the law wants to protect the rights of parents over their children. The parents have to got the right to custody, to give educational training and religious training for their children. Therefore, an agreement by which all such powers have been absolutely transferred from parents to strangers is void.

In **Giddu Narayan Vs Mrs. Annie Besent (1907) 38 Mad 807)**. The father of two minor sons agreed to transfer the guardianship of the boys to Mrs. Annie Besant and agreed not to revoke the authority. Subsequently he wanted to rescind the agreement. It was held, the guardianship cannot be permanently alienated. Therefore the father got back the custody of the boys. It was observed that father's guardianship is in the nature of a sacred trust and he cannot therefore substitute in his lifetime another person in his place.

(iv) Marriage Brokerage contracts:

An agreement to procure the marriage of a person in consideration of a sum of money is called marriage brokerage contract. These contract are void as being opposed to public policy.

For example:

If 'A' pays 'B', a stranger a certain sum of money to procure a wife for him, he cannot enforce the agreement as it is opposed to public policy.

The common law is that every person must marry out of deliberate choice, if not, out of affection and therefore, a contract which gives a person a pecuniary interest in the marriage of another is void. Marriage brokerage means a contract by which one person undertakes in consideration of money to procure a marriage for another. **In *venkata krishnayya vs lakshmi* (32 Mad 185)** it was held that an agreement to pay money to the parent or guardian of a minor in consideration of his consenting to give the minor in marriage and if the party fails to pay the amount as promised, the other party's is not entitled to recover the same.

In **vaithiyanathan vs gangaraju (1893)**, the plantiff, a purohit was promised to pay Rs, 50/- in consideration of procuring a second wife for the defendant. The promise was held to be un enforceable.

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Therefore an agreement by which a person, for money consideration, promises to procure the marriage of another is void, being opposed to public policy. A promise by a married person to marry during the life time of his first wife is void. Likewise an agreement to give money to a woman in a consideration of getting divorce is void on the ground that all such agreements are interfering with the performance of marital duties.

(v) Trafficking in public offices and titles:

Agreements concerning the sale or transfer of public offices and titles or for the procurement of a public recognition like Bharat Rathna, padma Bhusan or param veerchakra, etc for monetary consideration are unlawful and opposed to public policy. If such agreements are enforced, it would lead to inefficiency and corruption. Section 6(f) of the Transfer of property Act provides that a public office cannot be transferred and cannot take the salary of a public officer. Likewise, An agreement to pay money to a public servant to induce him to act corruptly or to do some undue favouratism, is void on the ground of public policy.

In **Parkinson vs. College of Ambulance Ltd (1925)3K.B** an agreement whereby one person made a donation to a charity in consideration of a promise to secure him the title of 'knighthood' was held void as it is opposed to public policy.

In the case of **N.V.P. Pandian vs. M.M. Roy, A.I.R. (1979) Mad, 42**, the plaintiff paid a sum of Rs, 15,000/- to the defendant who agreed to obtain a seat for his son in amedical college. But, the defendant failed to get the seat. So, the plaintiff filed a suit for the refund of Rs, 15,000/-. It was held that the agreement was against public policy and illegal.

(vi) Agreements tending to create interest opposed to duty:

An agreement which tends to create an interest in favour of a person which would conflict with his duty is illegal on the ground that it is opposed to public policy . Thus an agreement by a person in Government service for the purchase of land situated within his circle is illegal as opposed to public policy.

In the case of **Neville –Vs- Dominion of Canada News co.Ltd, (1915) 3K.B. 556,** an agreement by a newspaper proprietor not to commit on the conduct of a particular person is unlawful being opposed to public policy.

(vii) Agreements in restraint of personal liberty:

Agreement which restricts the personal liberty of the contracting parties to it are void as being against public policy.

(viii) Agreements interfering with marital duties:

Agreement which interfere with the performance of marital duties are void as being opposed to public policy.

In **Roshan Vs. Mohamad (1887),** it was held that a promise by a married person to re-marry, during the lifetime or after the death of spouse was void.

In **Tikyat Vs Manohar (28,cal 751),** where an agreement in contemplation of divorce (e.g) an agreement to lend money to a women in consideration of getting divorce from her husband and re-marrying the money-lender was held to be void as being opposed to public policy.

(ix) Agreements to defraud creditors or revenue Authorities:

An agreement, the object of which is to defraud the creditors or revenue Authorities is opposed to public policy and therefore such agreement is not enforceable. Similarly every transfer of a property which is not made to a purchaser in good faith and for valuable consideration, is void against the official receiver or assignee if the seller is declared as insolvent by the court on a petition presented with in two years from the date of transfer.

6.3. VOID AGREEMENTS:

All agreements can not be enforceable by law. Only those agreements which fulfill all the essential elements laid down in section 10 of the contract Act can be enforced. Under section 10 of the contract Act, "all agreement is contracts if they are made.... and are not expressly declared to be void".

The Contract Act specifically declares certain type of agreements to be void. According to sec 2(g), "an agreement which is not enforceable by law is said to be void. Sections 24 to 30, 36&56 expressly declare certain type of contracts as void. An agreement may be void because of incompetence of parties (sec 11), the consideration and object is unlawful [sec23] and agreements made under a mutual mistake of fact (sec 20). In addition to these agreements, the following agreements are expressly declared to be void by the contract Act.

1. Agreements, the consideration or object of which is unlawful in part [section .24]
2. Agreements made with consideration(sec 25)
3. Agreements in restraint of marriage (sec 26)
4. Agreements in restraint of trade (sec 27)
5. Agreements in restraint of legal proceedings (sec 28)
6. Uncertain agreements (sec 29)

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Check Your Progress Questions

2. What are agreements in restraint of trade?

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7. Wagering agreements (sec 30)
8. Agreements contingent on impossible events (sec 36)
9. Agreements to do impossible acts (sec 56)

1) Agreements, the consideration or object of which is unlawful in part:

Section 24 deals with partial illegality of consideration. According to Sec 24, if any part of a single consideration for one or more objects, or anyone or any part of anyone of several considerations for a single object, is unlawful, the agreement is void.

Illustration

'A' promises to superintend on behalf of 'B', a legal manufacturer of Indigo, and an illegal traffic in other articles. 'B' promises to pay 'A', a salary of Rs 10000/- per year. This agreement is void, because the object of 'A's promise and the consideration for 'B's promise being in part unlawful.

[This is elaborately discussed in the next unit 6.5]

2) Agreements Without Consideration: [sec 25]

Section 25 declares that an 'agreement Without Consideration is void'. But it has certain exceptions. [This section has already been discussed in previous chapter, "consideration"].

3) Agreements in restraint of marriage: (sec 26)

According to sec 26 ,"Every Agreements in restraint of marriage of any person other than a minor is void". This is because the law regards marriage and marital status as the right of every individual. Every person has the freedom to marry and the marriage ought to be free. Unsuitable marriage should be prevented by preventing third parties from getting financial profit by bringing the matrimonial unions. An agreement restraining a person not to marry is contrary to public policy and illegal. Similarly, an agreement restraining a person from marrying any body or from marrying any body except a particular person is also void.

For example

'A' enters into an agreement with 'B' to marry no one else except 'B'. This agreement is void.

In the case of **Lowe Vs Peers (1768)**,'P' promised to marry 'L' only and none else and to pay 'L' a sum of £.1000 if he married someone else. But, 'P' married another lady. So, 'L' sued 'P' for the recovery of that sum on the ground that 'P' married someone else.

It was held that the agreement was in restraint of marriage and void. Therefore, the plaintiff 'L' could not recover the sum agreed.

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In English law, a partial restraint on marriage is accepted if it is reasonable and only the agreements which are absolute restraint of marriage is void. But, in India, even partial restraint of marriage is not permitted.

Agreements for future separation between husband and wife:

An agreement for the future separation of husband and wife is opposed to public policy and thereby void.

Likewise, an agreement to live apart or to obtain divorce are not enforced in court of law, as they are against public policy.

4. Agreements in restraint of Trade: [sec.27]

A contract in restraint of trade is one which restricts a person from exercising his trade and profession. Public policy requires that every one should be free to exercise his profession, occupation and to pursue his business and trade. Freedom of trade is a fundamental right guaranteed by our Indian Constitution. Any agreements in restraint of this freedom of trade are against public policy and void.

Section 27 defines, "Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void".

An agreement in restraint of trade can be under the following classes.

(1) An agreement between the buyer and the seller of a business together with its good will whereby the seller covenants not to carry on a business which will compete with that of the buyer.

(2) Agreement between the master and the servant whereby the servant agrees not to set up business of his own after leaving the master's employment.

(3) Agreement between the traders or manufacturers forming a combination for the purpose of a regulating their trade relations or supplies or production or to maintain the price of articles marketed by them.

Position in England:

Under early English law, all agreements in restraint of trade were totally void. It was immaterial whether the restraint was general or partial. But, later on, it was accepted that reasonable restrictions in the interest of parties and general public are not totally void. The partial restraint of trade or a restraint confined to

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a limited space and time is valid and enforceable. In the recent years, the word partial restraint was replaced by the term reasonable. So, the present position in England that reasonable restriction on the freedom of trade may be imposed by mutual agreement.

The validity of partial restraint in an agreement between the buyer and the seller was first considered in the case of **Rogers vs. Parry (1613)** and it was held as valid and enforceable.

The law relating to restraint of trade was elaborately considered in the leading case of **Nordenfelt vs. Maxim Nordenfelt co.(1894 A.C 535)**.

The facts of this case are as follows: A Swedish gentleman sold the business of manufacturing guns and ammunitions to Maxim Nordenfelt and Co for a particular sum and agreed that for 25 years.

(1) he would not carry on similar business except on behalf of the company and

(2) that he would not carry on any business which is likely to compete in any way with the business of the company.

But after few years, Nordenfelt started a similar type of gun manufacturing business with a rival company dealing with guns. So the plaintiff company asked for injunction preventing the Swedish gentleman from violating the first covenant. The house of Lords held that the real test for determining the validity of agreements in restraint of trade was, whether the restraint imposed was reasonable, for goods consideration, not prejudicial to the interests of the public, not more onerous than necessary for the protection of the party imposing the restraint. It was held that restraint was reasonable and ought to be enforced.

The rule was stated in the following words:

"Restraints of trade, and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification and indeed it is the only justification. If the restriction is reasonable that is, in reference to the interest of the parties concerned and reasonable in reference to the interest of the public, so guarded as to afford adequate protection to the party in whose favour it is imposed, while at he same time, it is in no way injurious to the public".

In the case of the contract of service, master is in a position to dictate terms on the servant and so such restraints are viewed more critically by the courts. A restraint upon a servant will be upheld only if the master had some

proprietary interest to be protected. This point was considered in several decisions.

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Masson vs. Provident Clothing Supplying Co, A person was appointed by the company as a canvasser under an agreement that he would not for 3 years after termination of his employment with company, take employment with any similar business within 25 miles of London. The House of Lords held that the restriction over the area of 25 miles round London was not justified. Similary in **Herberd Morris Vs, saxelby (1916 I.A.C.633)** Here, sexelby had been employed as a draughtsman. The condition of employment was that for seven years after ceasing to be employed by the company, not to enter into employment of similar nature. It was also held that the restraint is unreasonable.

Esso Petroleum Co Ltd. Vs. Harpers George (Stourport Ltd. (1963 A.C. 259), In this case respondents were the proprietors of two garages. With reference to first garage, they entered into a 'solus' agreement for a period of four years and five months, whereby they agreed to purchase motor fuel to be sold at that garage, from the appellants and from none others. Further the agreement contained a clause by which if they sold the garage, they were bound to procure the buyer to enter into a similar agreement provided that they were to keep open the garage at all reasonanle times for the sale of petrol. For this, appellants agreed to allow some rebate per gallon to the respondents. The second 'solus' agreement related to a mortgage of the garage premises in favour of the appellants. They agreed to repay the loan with interest during 21 years and not to redeem the mortgage before that period.

The important point to be considered was whether these two agreements would amount to a restraint on trade. The House of Lords held that the agreements for four years and five months on the first garage was reasonable in regard to the interest of the parties. But the court held that the second agreement for the twenty one years was unenforceable.

Position in India:

The Indian law as stated in section 27, prevents a partial as well as total restraint of trade. Accordingly, all agreements in restraint of trade whether general or partial, qualified or unqualified are void. This section is therefore more strictly worded than the rule of English law.

In the case of **Oakes & Co Vs. Jackson (1876),** the defendant who was the servant of a company agreed not to employ himself after leaving the plaintiff's service in any similar concern within a distance of 800 miles from Madras. It was held under sec.27, the contract was void.

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But a business agreement to purchase all requirements from a certain firm or to sell all production to a certain party is not void as being in restraint of trade, because it promotes business and does not restrain it (**Mackenzie Vs. Sriramaiah 1890, 13 Mad. 472).**

Statutory Exceptions:

The following are the exceptions to the rule that "an agreement in restraint of trade is void":

1) **Sale of goodwill.** A seller of goodwill of a business may be restrained from carrying on (i) a similar business, (ii) within specified local limits, (iii) so long as the buyer or any person deriving title to the goodwill from him carries on a like business provided that such limits appear to the Court reasonable regard being had to the nature of the business (Exception to Sec. 27)

"Limits" means "local limits" and the duration of the restraint is so long as the buyer or any person deriving title to the goodwill from him carries on the like business [Hukmi Chand v. Jaipur Ice & Oil Mills Co., A.I.R. (1980) Raf. 155].

2) **Partners' agreements.**

(a) A partner shall not carry on any business other than that of the firm while he is a partner [Sec. 11 (2) of the Indian Partnership Act, 1932].

(b) An outgoing partner may agree with his partners not to carry on a business similar to that of the firm within a specified period or within specified local limits [Sec. 36 (2) of the Indian Partnership Act, 1932]

(c) partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits (Sec 54 of the Indian Partnership Act, 1932]

(d) Where the goodwill of firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business. But, subject to agreement between him and the buyer, he may not (a) use the firm name, (b) represent himself as carrying on the business of the firm, or (c) solicit custom of persons who were dealing with the firm before its dissolution [Sec.55 (2) of the Indian Partnership Act, 1932].

(e) Any partner may, upon the sale of goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits [Sec. 55(3) of the Indian Partnership Act, 1932].

In cases (b),(c) and(e), the Courts will enforce such agreement only if the restrictions imposed are reasonable.

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Other exceptions:

Trade combinations

Traders and manufacturers in the same line of business normally form associations to regulate business or to fix prices. The regulations as to the opening and closing of business in a market, licensing of traders, supervision and control of dealers and the mode of dealing are not unlawful even if they are in restraint of trade.

Examples:

(a) An agreement between certain ice manufacturing companies not to sell ice below a stated price and to divide the profits in a certain proportion is not void under Sec.27. Such agreements are neither in restraint of trade nor opposed to public policy **[S.B. fraser & Co. v. Bombany Ice Mfg. Co., (1904) 29 Bom. L.R. 107].**

(b) A combination to regulate supply and maintain price is not necessarily disadvantageous to the public and as such is not opposed to public policy **[North western salt Co. v. Electrolytic Co., (1914) A.C. 461].**

a) An agreement among the members of a society of hop growers to deliver all hops grown by them to the society which was to sell the hops and divide the profit among the members is valid [English Hop Growers v. Derring, (1928) 2 k.B. 174].

b) But a combination which tends to create monopoly and which is against the public interest is void **[Attorney General of Australia v. Adelaid S.S. Co., (1913) A.C. 724].** Same is the case when two firms enter into an agreement to avoid competition **[Jai Ram v. Kahna Ram, A.I.R. (1963) H.P. 3: Kores Mfg. Co. Ltd. (1958) 2 All E.R. 65].**

Service Contracts:

Sometimes an employee, by the terms of his service agreement, is prevented from accepting-

(i) any other engagement during his employment, and /or

(ii) a similar engagement after the termination of his services.

As regards the first restraint, it is valid and is not in restraint of trade if it is to operate while the employee is contractually bound to serve his employer

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(Niranjan Shankar Vs. Century Spinning & Mfg. Co. Ltd., A.I.R.(1967) S.C.1068]. The doctors, for example, are usually debarred from private practice during the term of their employment.

As regards the second restraint, it is void if its object is merely to restrain competition by an employee in his employer's business. Therefore, a restraint on an employee not to engage in a similar business or not to accept a similar engagement, after the termination of his services, is void. In **Brahamputra Tea Company v. Scarth, (1885) 11 cal 545,** it was held that an agreement restraining an employee from taking service or engaging in any similar business for a period of 5 years after the termination of his service was void. Similarly, a restraint on an actor that he would not act in any the are other than that of the employer during his tour of India was held to be void, being in restraint of trade **(Cochen v.Wilkie, 16 C.W.N.534)**

If a restraint in intended to protect an employer against an employee making use of a trade secrets learned by him in the course of his employment. The restraint is valid provided it is not for any other purpose also.

Examples

(a) A was chiefly engaged in making glass bottles. B, his works manager, was instructed in certain confidential methods concerning correct mixture of gas and air in the furnaces. B agreed that during the 5 years after the termination of his service, he would not carry on in the United Kingdom, or be interested in, glass bottle manufacturer. It was held that, A was entitled to protection and that the restraint was reasonable **[Forster & Sons Ltd. V . Sugett, (1918) 35 T.L.R.87]**.

(5) Agreements in restraint of legal proceedings: [Sec. 28]

It is a well-known rule of English law that 'an agreement purporting to oust the jurisdiction of the courts is illegal and void on the ground of public policy. The general rule is that a person cannot be restrained from taking legal proceedings by any agreement and such agreement is void.

Section 28 of the contract Act provides that

a) " Every agreement, by which any party there to is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or;

b) Which extinguishes the rights of any party, or discharges any party there to from any liability, under or in respect of any contract on the expiry of a

specified period so as to restrict any party from enforcing his rights is void to that extent".

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Thus, section 28 renders two kinds of agreements as void, viz,

(i) Agreements restricting enforcement of rights under or inrespect of any contract;

(ii) Agreements curtailing the period of limitation prescribed by law of limitation are void.

For example:

1) 'A', a servant agrees not to sue for his wrongful dismissal is void.

2) If 'A' promises to 'B', not to take any legal proceeding against 'B', is void.

In **Bennett Vs. Bennett (1952, 1 K.B. 249),** a wife petitioned for divorce from her husband and also for maintenance for herself and her son. Before a decree had been obtained, the husband entered into a separation agreement with his wife to make a certain annual payment to her and to her son in consideration that she would not proceed with the petition for maintenance. But, the husband failed to pay the arrears of annuity to his wife and therefore wife sued for recovery of that maintenance amount.

It was held that consideration for the promise by the husband was the wife's invalid promise not to take legal proceedings. So, the covenant by wife not to apply to the court for maintenance was contrary to public policy and void.

In the case of **Narasimha Raju Vs. Gurumurthy Raju, AIR 1963, (S.C) 107,** it was held that, a mortgage executed by the wife for making a third party to with draw a prosecution launched by him against her husband in respect of a non- compoundable offence is invalid.

In **Saroj Bandhu Vs. Jnanada, AIR 1932, Cal. 720,** it was stipulated in a maintenance agreement that the maintenance holder should not sue for arrears for two or more years. It was held that this stipulation was designed to curtail the period of limitation and was void.

Exceptions in Sec. 28:

There are two exceptions recognized to the above principle.

1.Reference to Arbitration:

Generally, agreements designed to oust the jurisdiction of courts are contrary to public policy. However, reference of future disputes to Arbitration is

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an exception to section. 28. This section does not render void, a contract by which two or more persons agree that any dispute which may arise between them shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

The arbitration agreement may contain a clause to the effect that no action should be brought on the subject matter of the dispute in a court of law before the arbitrator makes his award.

The validity of such a clause was considered by the House of Lords in **Scott Vs. Avery (1855),** it was held that, 'A provision in an agreement, requiring an award to be made by an arbitrator before recourse can be had to the courts is valid and binding. Such a term in an arbitration agreement is called a **"Scott Vs. Avery Clause".** Such an agreement does not exclude the jurisdiction of the courts.

In the case of **N.G. Insurance Co. Vs. United Equipment stores, AIR 1970, cal, 221,** the owners of a car sued the Insurance company for recovery of the charges incurred by him for repairing the car when it was involved in an accident.

The insurance contract contained a clause for arbitration which provided that ' the making of an award shall be a condition precedent to any right of action against the company". It was held that, such a clause is valid and since the suit was brought without first seeking arbitration, it was dismissed.

2.Existing questions to arbitration:

Section 28 shall not render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to reference to arbitration. Thus, this exception saves contracts to refer to arbitration questions that have already arisen.

6. Uncertain agreements [Sec. 29]

Section 29 provides that "an agreement the meaning of which is not certain or capable of being made certain, are void". It is a necessary requirement that an agreement in order to be binding, the terms must be definite and certain. If there is ambiguity in the wording of the contract, it is not possible to read the real intention of the parties to the contract. When the terms of a contract are uncertain and ambiguous, the contract is void and unenforceable. under sec. 93 of the Evidence Act, when the language of a document is ambiguous or defective, no evidence can be given to explain or amend the document.

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Illustrations:

(a) 'A ' agrees to sell to 'B', "a hundred bags of rice ". In this agreement, there is nothing to show what kind of rice was intended to sell by 'A'. So, this agreement is void for uncertainty.

(b) 'A' agrees to sell to 'B', his horse for Rs10000/- or 20000/-.There is nothing to show which of the two prices was to be given. Hence, the agreement is void for uncertainty.

Agreements in which price is to be based on luck or uncertain event are void. In the case of **Guthyng Vs. Lynn,** the buyer of a horse agreed to pay £5 more if the horse proved lucky. The agreement was held to be void for uncertainty. The court has no machinery to determine what luck, bad or good, the horse had brought to the buyer.

Similarly, an agreement to agree in future is void, for there is no certainty whether the parties will be able to agree.

Now, let us see some illustrations which are not uncertain agreements:

(c) 'A' agrees to sell to 'B', "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(d) 'A' agrees to sell to 'B', one thousand quintals of rice at a price to be fixed by 'C'. As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

7. Wagering agreements (Sec.30)

The term 'wager' means 'bet'. Wager is an agreement between two parties to pay money or money worth on the happening or non-happening on some uncertain event. According to sec.30, 'agreements by way of wager are void'. (This agreement is discussed in detail in unit 6.6)

8. Agreement contingent on impossible events are void (sec.36)

(It is also discussed in next topic "contingent contract". Ref unit 6.7)

9. Agreements to do impossible acts are void: (sec.56)

The topic is elaborately discussed in the next chapter. (Refer unit 8.4)

6.4. ILLEGAL AND VOID AGREEMENTS

The contract Act draws distinction between an agreement which is only void and the one in which the consideration or object is unlawful. Void agreements are elaborately discussed earlier.

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Illegal Agreement:

An illegal Agreement is one which is actually forbidden by the law; but a void agreement may not be forbidden. It is very important to note that "**Every illegal agreements is unlawful, but every unlawful agreement is not illegal**". It is sometimes difficult to decide as to whether an act is illegal or un lawful. In the cases of void agreements, the law simply says that if it is made, the court will not enforce it. For instance. Agreement without consideration is void (S.25), uncertain agreements (S.29) and wagering contract (S.30) etc. The afore said agreements are simply void but not illegal or unlawful. It affects only immediate parties and has no further consequences.

But an illegal agreement is not only void as between immediate parties but has the further effect that the collateral transaction to it also become tainted with illegality (i.e) where a contract is illegal then not only the contract, but also the collateral transactions are also void.

For example :

(a) 'A' lends Rs. 50000/- to 'B' to help him to purchase some prohibited goods from 'P' an alien enemy. If 'B' enters into an agreement with 'P' to purchase that prohibited goods, the agreement will be illegal and likewise, the earlier agreement for loan between 'A' and 'B' shall also became illegal, being collateral to the main transaction which is illegal. So, 'A', contract recover the loan amount. but if 'A', the money lender did not know the purpose of loan, he can recover the amount.

When persons reciprocally promise, firstly to do certain things which are legal, and secondly, under specified

(b) 'A' borrows Rs.20000/- from 'B' for contracting with 'C' to manufacture rifles illegally. If the object was known to 'B' then the agreement between 'A' and 'B' is also void, even though the agreement is apparently lawful.

c) If 'A' borrows sum money from 'B' for the purpose of betting with 'C' the transaction between B and C is unlawful and not illegal and the agreement between A and B is valid. Even if, 'B' is aware of the purpose for which the money was borrowed, the agreement between 'A' and 'B' will not be affected.

Thus, "all illegal agreements are void but all void agreements are not illegal."

Only acts which constitute crimes or those opposed to public policy are declared illegal. If a commission of a crime is involved then it will be declared as illegal. A criminal act is one which is forbidden by law and is something more

than a mere disobedience of law. All agreements which are forbidden by some rule or law are unlawful, if the object of an agreement or the consideration is the doing of an act forbidden by law, the agreement is void.

Alexander . V. Rayson , (1936) I.K.B. 199: P let a flat to R at a rent of 1200 per year. To reduce the Municipal tax he entered into two agreements with R one for the payment of rent of £450 and another for £750 for services in connection with the flat. R filed a suit to recover the amount of £750. It was held that the agreement was made to defraud the municipal authority and was void and P could not recover the amount.

In Srinivasa Rao .V. Raja Rama Mohanrao (1951 92) M.L.J 254), A advanced money to B for celebrating the marriage of his minor child, contrary to the provisions of the child marriage Restraint Act of 1929. The object of the loan is contrary to public policy and unlawful within the meaning of section 23, though such a marriage is not invalid. A cannot recover the amount from B.

6.4.1 EFFECTS OF ILLEGALITY :

As a general rule, illegal agreements are void ab initio and un enforceable. This is based on the following legal maxims.

1. Ex turpi causa non oritur action (i.e) 'No action arises from a base cause'. The effect of this is that the law discourages people from entering into illegal agreements.

2. **'In pari delicto, potier est conditio defendentis'** which means, in case of equal guilt, the defendant is in a better position.

For example :

'A' agrees to pay 'B' Rs. 5000/- if 'B' beats 'C'. Here if 'B' beats 'C' he cannot recover the amount from 'A'. Likewise, if 'A' has already paid the amount and 'B' does not beat 'C', 'A' cannot recover the amount.

If an agreement is illegal the law will not help both parties to the agreement.

Thus the effects of illegal agreement are (i) the contract is void and un enforceable and no action can be taken for recovery of money or property transferred under an illegal agreement for breach of illegal agreement.

(ii) The collateral transactions to an illegal agreement are also treated as illegal.

6.4.2. DISTINCTION BETWEEN ILLEGAL AND VOID AGREEMENTS

(i) Collateral contracts : collateral transaction means a transaction subsidiary or ancillary to the main transaction. The collateral transactions to an

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illegal agreement is also treated as illegal and un enforceable. But, in a void contract, the main contract alone is enforceable. It will not affect the collateral transactions.

(ii) Recovery of things : When a contract is void, under secyion. 65, the defendant who has received the benefit under the void contract has to restore it to the person from whom he received it. But, Sec.65 is not applicable to illegal contracts. If anything was paid under an illegal contracts, it cannot be recovered.

'In Pari delicto'

In the case of illegal contracts, the maxim, **"In Pari delicto potier est conditio defendentis"** Which means "in equal fault the condition of the possessor is stronger" is applied.

In the case of equal guilt in an illegal agreement, the position of the defendant is better than that the plaintiff.

In Collins .V. Blantern (1767), Chief justice, 'Willmot' observed that "No polluted hand shall touch the pure fountains of justice. Who ever is a party to an unlawful agreement, if he once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of court of fetch it back again".

The above principle is expressed in the above maxim "in pari delicto..."

Exceptions :

In the cases of equal guilt in an illegal agreement, there are certain exceptions and the plaintiff may, however sue to recover money paid or property transferred in the following cases.

(i) The illegal purpose not yet accomplished

(Where contract is still executory) when the contract is still executory in the sense that no part of the illegal purpose has been carried into effect the money paid or goods delivered for the illegal purpose may be recovered.

(ii) Parties not 'in pari delicto'

Where the parties are not in pari delicto (i.e) not equally guilty. The lesser guilty party can recover the money paid or property transferred under an illegal agreement. For instance, where he was induced by fraud, coercion etc to enter into an agreement.

(iii) Where recovery is possible without relying on illegal contract:

Transactions arising out of an agreement to do an illegal act, if they are such that when taken separately from the illegal act, they would be valid. (i.e)

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when the plaintiff can establish his claim on the things transferred under an illegal agreement without relying on illegal agreement, the court will enforce the claim and he can recover the things.

6.5. DOCTRINE OF SEVERABILITY: (secs. 24, 57, 58)

Where an agreement is partly illegal, and partly legal, the court will enforce the part which is legal provided that, it is separable from the rest of the agreement. If the illegal promise or act a cannot be separated from the legal act, the whole contract is declared as illegal.

When a contract consists of both valid terms and also illegal or void terms, the question may arise whether the whole contract may be set aside.

The general rule is that "Where you cannot the sever the illegal part of a covenant, the contract is altogether void; but you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good". This rule is however subject to a limitation (i.e) if any part of the consideration for a promise is illegal, the whole promise cannot be enforced.

For example : 'A' promises 'B' (i) to clean B's garden and (2) to murder B's enemy 'C' for a total consideration of Rs. 1 lakh. Here, there can be no severance of the contract and it is totally void.

Suppose, the contract contains two separate promises and two separate considerations (e.g.) (1)a promise to clean the garden for Rs. Rs. 10,000/- and (2) another promise to murder 'C' for Rs. 1 Lakh. Here the illegal contract may be severed, from the legal part and the legal part can be enforced at court of law.

In many cases of agreement relating to restraint of trade, and legal proceedings, the court removes the objectional clause in the agreement and allows the parties to enforce the remaining part. Sec.27 defines, "an agreement in restraint of trade is void to that extent". (i.e) to that extent of unreasonable restraint. So, except the clause which unreasonably restrict the freedom of trade, the remaining part of the agreement is valid.

6.5.1. BLUE PENCIL THEORY

Severance is possible only when the illegal part is verbally separate from the rest of the contract. Where an agreement consists of two separate parts one of which is legal and the other illegal, the legal part can be separated from the illegal part by cutting off the offending words by running a blue pencil and make the remaining part of the agreement legal and enforceable. This principle is called

Check Your Progress Questions

5. Explain the doctrine of severability

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'Blue pencil rule'. If the legal and illegal part of the agreement are inseparable, then it is totally void.

There is no question of severability where the agreement is to commit murder or Robbery, to defraud the revenue or to promote illegal cohabition. But, in the case of the other contract, if the legal and illegal conditions are distinct and separate, each being supported by its own consideration the court will strike out the illegal portion of the agreement and enforce the legal part. It is generally called as 'Blue pencil Rule'.

Severance can be effected when the part severed can be removed by running a blue pencil through it without affecting the meaning of the remaining terms.

In such cases, the court will not reconstruct a new cannot. It will only strike out the offending part and will not add any words of its own.

Now, let us see some case laws:

In the case of **Gold Soll .V. Goldman (1915)1,ch.292,** 'A' sold a business in imitation jewellary to 'B' in London. He promised that for two years, "he would not carry on any business in real or imitation jewellary, in the United Kingdom or in France or in U. S. A." It was argued that the restraint on his trade was too wide to be reasonable. But, the court uphold it partially by striking out the offending words and held that the rest of the contract would be valid.

The Indian contract Act. Sections 24, 57 and 58 gives the corresponding rules to the doctrine of severability.

(i) **Agreement void, if considerations and object unlawful in part :** Under section 24, agreements are void if consideration and objects are unlawful in part. If any part of a single consideration for one or more objects, or anyone or any part of any one of several considerations for a single object, is unlawful, the agreement is void..

Illustration:

'A' promises to superintend, on behalf of 'B' a legal manufacture of 'indigo' and on illegal traffic in other articles, 'B' promises to pay to 'A', a salary of Rs 10000. The agreement is void, since the consideration for 'B's promise being in part unlawful.

(ii) Reciprocal promises(Sec.57)

Section 57 deals with 'reciprocal promises' to do things legal and also other things illegal. By Sec.57. 'Where persons reciprocally promise firstly, to

do certain things which are legal and secondly under specific circumstances to do certain other things which are illegal, the first set of promises is a contract but the second is a void agreement.

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Illustration :

'A' and 'B' agree that 'A' shall sell 'B' a house for Rs. one lakh but that, if 'B' uses it as a gambling house he shall pay 'A' Rs. 50,000 for it. Here the first set of reciprocal promises namely to sell the house and to pay Rs.1,00,000/- is a valid contract. But, the second, set is for an unlawful object, namely, that 'B' may use the house as a gambling house is a void agreement.

Alternative promise, one branch being illegal (Sec.58)

Sec.58 provides for a rule where one branch of an alternative promise is illegal.

According to Sec.58, "In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration :

(e) 'A' and 'B' agree that 'A' shall pay B Rs.10000/- for which 'B' shall afterwards deliver to 'A' either rice or smuggled opium. This is a valid contract to deliver rice and void agreement as to the smuggled opium.

6.6. WAGERING CONTRACT: [section. 30]

The term wager means a "bet". A wager is an agreement between two parties by which one promises to pay money or money's worth on the happening of some specified uncertain event in consideration of the other party's promise to pay if the event does not happen.

For example :

(1) If 'A' and 'B' enter into an agreement which provides that if it rains on a particular day, 'A' will pay 'B' Rs, 1000/- and if it does not rain, 'B' will pay the same amount to 'A'. It is a wagering agreement.

The subject matter of a wager may be anything. It is a game of chance, in which the event of either gain or loss, is wholly depends upon an uncertain event. It is made on the result of an uncertain event such as a game or race. Each party stands equally to win or lose the bet. The money risked in a wager is called "stakes". The person who holds the bet money to be paid to the winner is called "stake-holder". The wagering contract is void and unenforceable.

Check Your Progress Questions

3. What is meant for wagering contract?

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6.6.1.DEFINITION:

section 30 of the contract Act deals with wagering contract. This section, does not define the term 'wager'. Section 30 only says that " agreements by way of wager are void."

Section 30 defines as follows:

"Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made".

Sir William Anson defines, "A wager as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event".

In the words of **Cockburn, C.J,** " it is a contract by A to pay money to B on the happening of a given event in consideration of B's promise to pay money to A on the event not happening".

The term 'wager' has been explained in the following cases.

A most illustrative definition was given by Hawkins.J, in **Carlill vs. Carbolic smoke ball Co. Ltd (1892) 2 Q.B.695,** 'It is essential to a wagering contract that each party under it either win or lose, whether he will win, or lose being dependent on the issue of an uncertain event. If either of the parties may win but cannot lose; or may lose but cannot win, it is not a wagering contract".

In **Thacker vs. Hardy (1878) 4.Q.B.695,** it is observed that, 'the essence of gambling and wagering is that one party is to win and the other to lose upon a future uncertain event, that is to say, if the event turns out one way, A will lose but if it turns out the other way he will win".

Therefore there must be mutual chances of gain and loss in wagering contract.

6.6.2. ESSENTIAL FEATURES OF WAGERING CONTRACT:

The following are the essentials of a wagering contract.

(i) There must be a promise to pay money or money's worth.

(ii) The promise must be conditional on an event happening or not happening.

(iii) The performance of the contract must depend upon the determination of an uncertain event.

(iv) There must be two parties. Upon the determination of the

contemplated event, each party should stand to win or lose. The lose of one party must be the gain of other.

(v) Neither party should have any control over the happening of the event in one way or the other. It one of the parties has the event in his own hands, the agreement is not a wager.

(vi) There must be common intention to bet at the time of making such agreement.

(vii) The contracting parties should not have any interest in the happening or non-happening of the event other than the sum or stake he will win or lose.

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Illustrations:

1. In a wrestling bout, 'A' tells 'B' that wrestler No.1 will win. 'B' challenges the statement of 'A'. They bet with each other over the result of the bout. This is a wagering agreement.

2. 'A' promises to pay Rs.500 to B if the height of the light house at Chennai is 200 feet and 'B' promises to pay Rs 500 to 'A' if the height is not 200 feet. This is a wagering agreement.

6.6.3. EFFECT OF WAGERING CONTRACT:

All agreements by way of wager are void and cannot be enforced in any court of law. Section 18 of the English Gaming Act, 1845, declared all kinds of wager or games as null and void and prohibited the recovery of money or valuable thing won upon any wager or deposited with stake holders.

In India, wagering agreements have been expressly declared to be void. In the state of Maharashtra and Gujarat, they have been declared as illegal.

Sec.30 clearly states that no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide by the result or any game or other uncertain event on which any wager is made. Hence the amount won on a wager cannot be recovered. Any money deposited with a person to enable him to pay to the other party who won upon a wagering transaction cannot be recovered. Where in the case of **Ratnakalli Guranna V.Vachalipu (A.I.R.1925 Mad 1041)** it was held that the winner upon a wagering transaction cannot recover money, but the depositor may recover it from the stakeholder before it is paid to him (winner)

In **Badridas Vs. Meghraj A.I.R.[1967] Cal.25,** where a promissory note was executed for payment of indebtedness arising out of wagering transactions

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in shares, it was held that the promissory note was not enforceable by the court.

6.6.4. EFFECT OF COLLATERAL TRANSACTIONS:

A wagering contract being only void and not illegal, a collateral transaction can be enforced in law. Since wagering agreements are void, transactions collateral to them are not affected and they are not void under Section 30. So, however, in the states of Maharashtra and Gujarat, the wagering agreements have been declared as illegal and in the rest of India, collecteral transactions are valid.

For Example:

1] 'A' lends money to 'B' to pay off a gambling debt. Here 'A' can recover the money from 'B' since it is a collateral transaction.

2] 'A' lost Rs.8500/- to 'B' on horse races. Subsequently, 'A' executed a hundi for same amount in favour of 'B', to prevent 'B' being declared as a defaulter in his club. 'B' filed a suit on the Hundi. 'A' pleaded that it was a wagering transaction and consideration was unlawful. It was held that a wagering agreement is void but does not affect the collateral transactions **[Liecester & Co Vs. S.P.Mullick [1923] Cal.445]**

In **Gherulal parekh Vs. Mahadeo das [A.I.R.1959 SC 781]**, it was held that where a partnership to enter into for wagering transactions is not illegal under Sec.23 of the contract Act and therefore a partner who has paid the losses on wagering transactions may recover the proportionate shares from the other co-partners. The Supreme Court observed that it is not forbidden by law and the transactions Collateral to the main transaction are enforceable. So it may be seen that a wagering agreement is not unlawful under sec.23 of the Contract Act and therefore the transactions incidental to or collateral to the main transactions incidental to or collateral to the main transaction are not void but enforceable. Thus in **Beni Mahodas v. Kanusal Kishore Dhusar. [I.L.R.(1900) 22 all 452)** it was held that the plaintiff who lent money to the defendant to enable him to pay off a gambling debt was allowed to recover the same from the defendant.

Muthuswamy Pillai-Vs-Veeraswami Pillai (1936) 70 M.L.J.433): The plaintiff and defendant went to a horse race and each put an equal sum of money on the same horse which won and the defendant in whose name the bet was made collected the amount but did not pay the share to the plaintiff. It was held that the defendant should pay the half share to the plaintiff for his benefit and section 30 is no bar to the plaintiff for recovering his half share.

Illustration: (1) A Promises to pay Rs.290 to B if there would be rain on a particular day and B promises to pay Rs.500 to A if it did not.

According to English Law wagering contract is illegal. Therefore not only the contract of wager, but also the collateral transaction is void.

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6.6.5 COMMERCIAL TRANSACTIONS AND WAGER : (DEALING IN DIFFERENCES)

Speculative transactions are generally valid. The Speculation is with reference to the rise and fall in the market. If the agreement is for the purchase of certain goods at a particular rate on a future date, then the buyer would be entitled to claim the goods on that date at the speculated price even if the market rate on that day is higher then the previously agreed price. It is a legitimate business transaction. Such transaction is common in gold, silver stocks etc., Thus, an agreement for actual purchase and sale of any commodity is not a wagering agreement. But, an agreement to settle the difference between the contract price and market price of certain goods on a specified day has been held to be a wager. In such cases, if the Intention of both parties is neither to give nor call for delivery of the goods, but only to deal in the difference in price, the transaction is wager and therefore void.

In **Kong yee Long Vs. Lawjee (28:1A.236)**, the defendant, a rice mill owner with a factory capacity of 10,000 bags of rice to a month, entered into a contract for the supply of two lakhs bags of the agreeable value of five crores to the plaintiff for seven weeks. None of the transactions were performed, but the defendant passed a promissory note in favour of the plaintiff for the difference in the prices. The privy council held that the transaction was obviously a wager. The promissory note could not be enforced by the Plaintiff.

6.6.6. LOTTERY:

Lottery is an arrangement for the distribution of prizes by chances among persons purchasing tickets. Each ticket represents a chance of winning a prize. So, a lottery, which is a game of chance either to win or lose is a wagering agreement. An agreement to buy a ticket for a lottery is also a wagering agreement. Under Section 294-A of the Indian penal code, any one who keeps any office or place for the purpose of drawing any Lottery (other than state Government) shall be punished with imprisonment for a term which may extend to six months or with fine or with both. Government may authorise a private person to run a lottery. In such a case, it will not be a crime but the lottery remains a wager and the transaction will be void under section 30 of the contract Act.

6.6.7.EXCEPTIONS:

Section 30 deals with one exception in favour of certain prizes for horse racing. "A Subscription or contribution or agreement to subscribe or contribute,

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made or entered into for or towards any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winners of any horse race", shall not be rendered unlawful by the provisions of Section 30 of the contract Act.

Moreover, the following transactions are not wagers:

1. Cross Word Competition:

Where prizes are awarded based on skill or any competitions which involves the application of skill or any competitions of plays are not wagers [e.g] Cross word competitions. But in case where prize depends upon a chance of fortune, it is a lottery and a wagering transaction. According to prize competition Act,1955 prize competitions in games of skill are not wagers provided the amount of prize does not exceed Rs.1000/-.

2. Games of Skill:

Games of skill are not wagers. For example: Picture puzzles or athletic competitions. In the case of **Baba Saheb Vs. Raja Ram A.I.R.(1931) Bom.264**, two wrestlers agreed to enter into a wrestling contest on the condition that the party failing to appear on the day fixed was to forfeit Rs.500/- and the winner was to be awarded Rs.1,125/- out of the sale proceeds of tickets. It was held that, the agreement was not wager one since it involved games of Skill.

3. **Share market transactions** in which delivery of stocks and shares is intended to be given and taken are not wagers.

4. **A contract of insurance is not a wagering contract.**

6.6.8. TEJI MANDI TRANSACTION

A Teji Mandi transaction has been defined as a transaction which consists of an ostensible sale by 'A' to 'B' of a double option of becoming either the purchaser from 'A' or the seller to him, of certain goods on some future date at a price fixed at a time when the transaction is entered into".

Sec 19 of this Act prohibits Teji Mandi transactions, known as options in goods. An option in goods is a contract for the purchase (or sale) of a right to buy (or sell) or to buy and sell, goods in future.

In Teji Mandi transactions, the buyer (Teji) pays a premium to the seller, over and above the contract price of the goods. The buyer is thereby given the option of asking for goods or return of the price on the settlement day if the market rises. If the market falls the premium is forfeited].

Check Your Progress Questions

6. Define 'Teji Mandi transaction'

There are earlier decisions of the Bombay high court where it was held that Teji mandi transactions are in the nature of gambling transactions. But, Teji

Mandi transaction, unless in which the parties intended neither to ask for nor give delivery of the goods, are not wagering contracts.

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In **Manilal Vs. Alibhai**, it was held that 'Teji Mandi transactions cannot be held to be wagers on account of their apparent nature and characteristics alone without proof of the fact that the common intention of the contracting parties at the time of the contract was to deal only in differences and no circumstance to call for or to give delivery.

6.6.9. COMPARISON WITH INSURANCE CONTRACT :

"Contracts of insurance bear certain resemblance to wagering contracts, but they are really transactions of a different character".

Insurance contract are not wagering contracts. There is no possibility of any gain; because the underlying principle in insurance contracts is to indemnify the individual from loss either by fire, accident or death. In insurance contracts the payment of money by the insurance company mainly depends upon a future uncertain event of the insured death or destruction of insured goods. This is the reason to treat a contract of insurance resembles a wagering contract. The following are the principal differences between them.

(i) In Insurance contract, the insured has an insurable interest in the subject matter. But, in a wagering contract, the parties have no such interest in the contract.

(ii) A contract of insurance, except life insurance, is a contract of indemnity. In a wagering agreement, the wager amount is fixed.

(iii) A contract of insurance is perfectly legal and enforceable. But a wagering contract is void.

(iv) Since contract of insurance is a contract of indemnity, the actual loss will be compensated. But in wagering contract, the amount agreed is not enforceable.

(v) Contracts of insurance are beneficial to the public; where as, wagering agreement do not serve any useful service to the public and it is just a gamble.

Chit fund transactions:

Chit fund transactions are also not covered by this section and they are not wagers.

Check Your Progress Questions

8. Is a contract of insurance a wagering contract?

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6.7. CONTINGENT CONTRACT (SECTION 31-36)

Contingent contract is a sort of conditional contract and the condition is of uncertain nature. Section 31 of the contract act defines the term contingent contract as "A contract to do or not to do something, if some event, collateral to such contract, does or does not happen."

Generally it is a valid contract. The right to enforce a contingent contract depends upon the happening or non - happening of the future uncertain event.

A contract may be (i) an absolute contract or (ii) a contingent contract. An agreement is absolute or unconditional when the promisor binds himself to performance in any event; contingent contract is conditional contract and its performance is due only on the happening of some uncertain event.

Illustrations : -

(a) 'A' contracts to pay 'B' Rs. 10,000/-, if B's house is burnt by fire accident. This is a contingent contract, because that contingency may or may not happen.

(b) 'X' agrees to sell his land to 'B' if he succeeds in his litigation concerning with that land. This is a contingent contract.

(c) 'A' contracts to pay a sum of money to 'B' on the expiry of a fixed time or on the death of a person is not contingent contract, because these events are of a certain nature.

(d) Contracts of insurance, contracts of indemnity and guarantee are well known types of contingent contract.

6.7.1 THE ESSENTIAL CHARACTERISTICS OF A CONTINGENT CONTRACT :-

(i) The performance of the contract must depend upon the happening or non-happening of some future event.

(ii) The event must be uncertain and;

(iii) The future uncertain event must be collateral to the contract.

In a contingent contract, the contingency on which the performance is to depend, is an event collateral to the contract. It shall not be a part of the reciprocal promises which constitutes the contract.

Check Your Progress Questions
4. What is a contigent contract?

For example : 'X' agrees to deliver 1000 bags of rice to 'B' and 'B' agrees to pay the price only afterwards. Here, the obligation of 'B' to pay is conditional upon the

delivery of rice by 'X'. This is not a contingent contract, because the event on which B's liability depends, is a part of the promise itself and not a collateral event.

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If the contingent event depends on the mere will and pleasure of one of the parties to the contract, it would not be valid.

6.7.2 RULES REGARDING CONTINGENT CONTRACTS :-

Sections 32 to 36 deal with the rules as to when a contingent contract becomes enforceable.

1. Enforcement of contracts contingent on an event happening:-

Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void (Sec 32).

Illustrations:

a) 'A' makes a contract with 'B' to buy B's horse, if A survives C. This contract cannot be enforced by law unless and until C dies in A's life time.

b) A makes a contract with B to sell a horse to B at a specified price, if C to whom the horse has been offered, refuses to buy him. The contract can be enforced by law unless and until C refuses to buy the horse.

c) A contract to pay B a sum of money when B marries C. Suppose C dies without being married to B. The contract becomes void.

Thus contingent contract depends on the happening of a certain event and can be enforced only on the happening of that event.

In **Narain Pattor Vs. Ankhoy Narain (1885), 12 Cal.152,** where there was a contract for sale of certain property contingent on the court sanctioning it, and when the court refused to sanction the sale, the contract was held to be void.

2. Enforcement of Contracts Contingent on an event not happening:-

Contingent contracts to do or not to do anything, if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before. (Sec 33).

For example: 'A' agrees to pay 'B' a sum of money, if a certain ship does not return. The contract can be enforced when the ship is sunk into the sea. Here the return of the ship becomes impossible and it is sure of the non happening of the event.

No liability can arise on a promise subject to a condition precedent until the condition is performed, and if by lapse of time or for any other reason, the condition cannot be performed, no liability can ever arise upon the promise.

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3. Future Conduct of Living Person:

If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should act within any definite time or otherwise than under further contingencies. (Sec 34).

Illustration:-

'A' agrees to pay 'B' a sum of money if B marries C. But C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

In **Frost Vs Knight (1872),** the defendant promised to marry the plaintiff on the death of his father. While the father was alive, he married another woman. It was held that it had become impossible that he should marry the plaintiff and she was entitled to sue him for the breach of contract.

4. Specified Event not happening within fixed time:

Contingent contracts, to do or not to do anything if a specified uncertain event happens within a fixed time, becomes void if, at the expiration of the time fixed, such event has not happened or if, before the time fixed, such event becomes impossible.

Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within fixed time may be enforced by law when the time fixed has expired, if it becomes certain that such event will not happen. (Sec 35).

Illustrations:-

a) 'A' promises to pay 'B' a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year and becomes void if the ship is burnt within the year.

b) 'A' promises to pay 'B' a sum of money if a certain ship does not return within the year or is burnt within the year. The contract may be enforced if the ship does not return within the year or is burnt within the year.

Sometimes, a time limit may be fixed for the happening or non-happening of the uncertain event. Then we have to wait till that period expires to enforce the contract.

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5. Impossible Events:

Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not known to the parties to the agreement at the time when it is made. (Sec 36).

Illustrations:-

a) 'A' agrees to pay 'B' Rs. 1,000/- if two straight lines should enclose a space. The agreement is void.

b) 'A' agrees to pay 'B' Rs. 5,000/-, if B will marry A's daughter C. But C was dead at the time of the agreement. Here the agreement is void.

6.7.3. DIFFERENCE BETWEEN A WAGERING AND CONTINGENT CONTRACT:-

1) A wagering agreement consists of reciprocal or mutual promises, each of them conditional on the happening of an uncertain event; but in a contingent contract, it is not necessary that there should be mutual or reciprocal promises.

2) All wager contracts are contingent contracts; but all contingent contracts are not by way of wager.

3) A wagering contract is void whereas a contingent contract is valid.

4) In a wagering contract, the future event is the sole determining factor of the contract. But in a contingent contract the future event is only collateral or incidental to the contract.

5) In the case of wagering contracts, the parties are not interested in the occurrence of the event except the amount they may win or lose; whereas in contingent contract the parties are interested in the occurrence or non-occurrence of the event.

6) In a wagering contract, neither party intends to perform the contract itself. But in the case of contingent contracts, the parties intend to perform their respective obligations.

6.8. SUMMARY:

The lawful object is one of the essential ingredients to a valid contract. The consideration and object to an agreement must be lawful. This Chapter clearly enunciates the basic principles of legality of object, agreements opposed to public policy, Illegal agreements, and various instances of void agreements.

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Further, this chapter elaborately describes the legal rules as to wagering and contingent contracts and the difference between them. Moreover, many case laws and illustrations are given for your easy understanding. We hope that you have understood the concept of legality of object from this chapter.

6.9 KEY WORDS

1.	Abide	-	Be faithful
2.	Annoy	-	Make Angry; anything which disturbs the peace of mind of a person.
3.	Annuity	-	Generally, a yearly payment of a certain sum of money.
4.	Arbitration	-	Referring the points in issue to the decision of one or more persons called Arbitrators on the basis of an agreement between the parties.
5.	Contingent	-	dependent; Accidental; An estate, interest, right or liability is said to be contingent when its existence depends upon an uncertain event.
6.	Collateral purpose	-	connected but aside from the main purpose
7.	Entrust	-	To invest someone with some responsibility
8.	Ex-orbitant	-	Very high [Price, change) etc.,
9.	Forbidden	-	Not Permitted
10.	Deceit	-	Cheating; deceiving
11.	Litigation	-	Judicial Contest; a law suit
12.	Wager	-	Bet
13.	Speculative	-	To transact business hoping fluctuations in price would be favourable, to guess

6.10 ANSWERS TO CHECK YOUR PROGRESS

For	Question No.1	-	Refer Section **6.1**
	Question No.2	-	Refer Section **6.3**
	Question No.3	-	Refer Section **6.6**
	Question No.4	-	Refer Section **6.7**
	Question No.5	-	Refer Section **6.5**
	Question No.6	-	Refer Section **6.6**
	Question No.7	-	Refer Section **6.2**
	Question No.8	-	Refer Section **6.6**

6.11. EXERCISE QUESTIONS:

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A) Short Answer Questions:

1. When is the object of an agreement not lawful?
2. Discuss the law relating to contracts in restraint of marriage.
3. Distinguish between a wagering contract and contingent contract.
4. What are the characteristics of a contingent contract?
5. Explain the doctrine of severability?
6. What is the effect of collateral transactions to wager?
7. Writ short notes on
   i. Wagering contract
   ii. Contingent contract
   iii. Blue pencil Theory
   iv. Maintenance and champerty
   v. Agreements in restraint of trade
   vi. Nordenfelt Vs. Maxim Nordenfelt

B) Long Answer Questions:

1) In what cases, the consideration and object of an agreement are said to be unlawful? Illustrate with examples.
2) Define wager. Point out the difference between a wagering and contingent contract. State if an insurance contract is one of a wager? or What is an agreement of wager? Briefly explain the provisions of the in the Indian contract Act. regarding wagering contract?
3) 'An agreement in restraint of trade is void' – Examine this statement mentioning its exceptions,
4) "Agreements in restraint of legal proceedings are void" – Discuss the statement and state the exceptions if any.
5) Explain the doctrine of public policy. Give examples of agreements opposed to public policy.

UNIT –7
PERFORMANCE OF CONTRACT

INTRODUCTION

A contract creates mutual obligations between the parties. The contracting parties must perform their respective promises. If the parties to the contract performed their obligations under the contract, they are free from any further liability under it and their contractual relationship comes to an end. Performance of a contract takes place when the parties to the contract fulfil their obligations arising under the contract, with-in the time and in the manner prescribed. There must be a complete and proper performance of contract. According to section 37 of the contract Act, the parties to a contract must either perform or offer to perform their respective promises unless such performance is dispensed with or excused under the provisions of the Act or any other law. This means that the performance may be either actual performance or attempted performance.

UNIT OBJECTIVES

- ❖ To learn about Tender of performance
- ❖ To know the legal rules relating to performance of contract.
- ❖ To analyse the concept of appropriation of payments
- ❖ To study about the contracts which need not be performed
- ❖ To analyse as to whether time is essence of contract
- ❖ To understand about 'assignment of contract'

UNIT STRUCTURE

7.1 Obligation to perform a contract
7.2 Offer of Performance or Tender of performance
7.3 Persons by whom contract must be performed (Devolution of joint liabilities)
7.4 Time and place of performance
7.5 Performance of Reciprocal promises.
7.6 Time as the essence of the contract
7.7 Appropriation of payments
7.8 Contracts which need not be performed
7.9 Assignment of contracts
7.10 Summary

7.11 Keywords

7.12 Answer to check your progress

7.13 Exercise questions

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7.1 OBLIGATION TO PERFORM A CONTRACT

Every contract creates a legal obligation which continues till the contract is discharged. Performance of a contract consists in doing or causing to be done what the promisor to do. Performance of a promise is the most usual mode of discharge of contract. Section 37 of the contract Act makes the promisor responsible for performing the contract.

Section 37 defines that 'the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of the contract Act or of any other law'.

Thus, each party to a contract is bound to perform his obligation under the contract. Moreover, under section 37 (Para 2), 'the promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract'.

It means that in the case of contracts not involving any special personal qualifications of a party may rely on the act of another as performance by himself. On the death of a contracting party, all the rights and liabilities of the deceased pass to the legal representatives as part of his estate. But there is an exception to this principle. In the case of contracts which involve personal elements or skill, and if the personal skill is the essence of the contract, the obligation can be performed only by that party whose personal skill is involved.

Illustrations

1. 'A' promises to deliver some goods to 'B' on a certain day on payment of Rs. 1000/- . 'A' dies before that day A's legal representatives are bound to deliver the goods to 'B' and 'B' is bound to pay Rs. 1000/- to A's representatives.

2. 'A' promises to paint a picture for 'B' by a certain day, at a certain price. 'A' dies before that particular day. The contract cannot be enforced either by A's representatives or by 'B', because it involves the personal skill of 'A'.

Liability of legal representatives

As already stated, if the promisor happens to die before performance, his legal representatives must perform his promise, unless there is a clear indication to the contrary in the contract and where the promise is purely of a personal

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nature (ie) involves any personal skill of the promisor. When the promisor dies, before the performance of contract, the promisee has to sue all the legal heirs on whom the promisor's property has devolved. **(Devi Dayal.Vs. Bhu Pindar Kumar AIR 1973).**

This is because the co heirs are not joint promisors jointly and severally liable, but all of them together represent one single promise. So, the promisee cannot compel any of them separately to perform the promise as a whole.

In Moolchand .Vs. Renuka Devi 1973 Raj. 13.

It was held that, when a lease is executed by two lessees and one of them died, the other lessee cannot sue for eviction of the tenant without impleading the heirs of the deceased lessee.

Moreover, the liability of the legal representatives will not be personal but shall be limited to the extent of the value of the estate (property) of the deceased promisor, in their hands. [(i.e.) inherited by them].

Two important points arise in connection with performance of a contract: 1) Privity of contract 2) Assignment of rights and liabilities of the contracting parties.

1) Privity of contract

This concept of privity of contract has already been discussed in the earlier lesson "consideration". Under the common law of England, only the parties to the contract are entitled to enforce the rights created under the contract. A person who is not a party to the contract is not bound by the terms of the contract. This rule is known as the doctrine of privity of contract. Therefore, privity of contract is said to exist between two persons when there is a valid contract which can be enforced as between them. But this principle is subject to certain limitations.

In Dutton.Vs. Poole (1678), the court held that a promise made by a son to his father to pay £1000 to his sister could be enforced by the sister. This decision was justified since the parties to the contract stood in near relationship.

In Dunlop Tyre Company. Vs. Selfridge & co (1915) A.C. 847, the house of Lords held that the promise made to Dew &co, by selfridge company could not have been enforced by Dunlop Co, because they were strangers to the contract.

Exceptions to this rule

In the following cases, a third party to a contract can enforce the contract.

(i) In the case of trusts, the beneficiary of a trust may enforce the contract even though he is a stranger to the contract.

(ii) Contracts of insurance are often made in favour of third parties and that third party to contract can enforce can enforce these contracts.

(iii) In the cases of family arrangement between male members of Hindu joint family, if any provision is made in the deed for maintenance or marriage expense of female members, they are entitled to sue even though they are strangers to such family arrangement.

(iv) Where a promise is made to an individual and a charge on specific immovable property is created for performance of promise, then the third party though a stranger to contract can enforce the same.

(v) Where there has been assignment of rights under a contract in favour of a third person, he can enforce the contract.

2) Assignment of contractual rights and liabilities :

(Refer Section 7.9)

7.2 OFFER OF PERFORMANCE OF TENDER OF PERFORMANCE

In English Law, Tender is a technical term for an offer of performance. It means 'an expression (offer) made by the promisor to the promisee about his willingness to perform his part of obligation under the contract. It is also called as **"attempted performance"**. Section 38, provides that where a promisor had made an offer of performance to the promisee and the offer has not been accepted by the other, the promisor is not responsible for non-performance nor does he thereby lose his rights under the contract (i.e) it excuses the promisor from further performance and he will be entitled to claim damages for breach of contract.

Tender or offer of performance is equivalent to performance itself. In order to treate as performance, tender or offer must be made strictly in accordance with the term: he contract and refused by the promisee.

A party who has entered into a contract to deliver goods or to pay money to another will be deemed to have performed it, if he has offered the goods or money to the party to whom the delivery or payment was to be made.

Let us illustrate the same : 'A' is bound to deliver 10 bags of rice to 'B' on a particular day and 'B' has to pay Rs. 5000/- for it. If on the appointed day and at the appointed place, 'A' offers to deliver or delivers 10 bags of rice to B, he is said to make a tender of performance. If such performance is not accepted, 'B' is liable for damages, as 'A' had performed his part of obligation.

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Check Your Progress Questions

1. What is meant by tender of performance?

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7.2.1 ESSENTIALS OF A VALID TENDER OF PERFORMANCE:

(i) It must be unconditional : It means that the tender of performance must be for the fulfilment of his whole obligation without any condition or variation from the original promise. A tender becomes conditional if it is not in accordance with the terms of the contract.

In Mohan Lal sah.Vs. Savitri Devi (AIR 1980 pat. 282) the tenant sent the rent to his land lord deducting the postal commission. The court held that this is not a payment of full rent by the tenant, even if the land lord had accepted the money order. (Acceptance of a commission cut money order is not a case of accepting lesser amount in full satisfaction of the original amount).

(ii) It must be made at the proper place and time : Generally the place and the time of performance of the contract will be fixed by the parties in the contract itself. The tender of performance is valid only if it is made expressing his willingness to perform it at that place and at that time which he has agreed under the contract.

E.g. A contracts with B to deliver 100 tons of groundnut oil at his warehouse on 1-6-2009. If A is interested in performing the contract, he must bring the oil to B's warehouse on the appointed say (1-6-2009). Also he must bring the oil before the usual closing hours of the warehouse and B should have a reasonable time of checking the quality and quantity of the oil.

In the above example, if A brings the oil at about 11 P.M. after the warehouse was closed on 1-6-2009 thinking that he has time till 12 P.M. to perform the contract, it will not be treated as a valid tender of performance.

(iii) It must be made by the person who is liable to perform the contract (ie), the promisor. Where the personal skill of the promisor is not involved then it can be performed either by the promisor or his duly authorised agent or by his legal representatives.

Eg. 'A' promises to deliver 10 bags of rice to B on 4.4.09 on payment of Rs. 10,000. 'A' may perform this promise by personally delivering the rice to B, or make arrangements with some one to deliver 10 bags of rice to B. If A dies before that date A's legal representatives are bound to deliver the rice to B (because personal skill of the promisor is not involved in the contract) and B is bound to pay Rs. 2000 to A's legal representatives.

When a promises accepts performance of the promise from a third person, afterwards he cannot enforce it against the original promisor (Sec. 41)

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(iv) It must be made to the promisee or to his authorised agent. A tender of performance made to any other person has no legal value.

(v) If there are more than one promisee, it is enough to offer the tender of performance to any one of the joint promisees. A tender of performance made to anyone of the joint promisees will have the legal effect that it has been made to all of them.

(vi) Where the place of performance of the obligations are fixed in the contract, it must be performed at that place. Where no place is fixed in the contract it is the duty of the promisor to approach the promisee to fix a place for the performance of the contract and it must be performed at the place so fixed.

(vii) If the contract is for delivery of goods tender of performance must be made much in advance giving reasonable opportunity to the promisee to inspect the goods and accept delivery before the due date expires.

(viii) If the promisor's obligation in the contract is payment of money, the tender of performance must be made in terms of money. If cheque is given it cannot be treated as a valid tender.

Effect of tender of performance : Tender is attempted performance. Just like an actual performance discharges a contract, a valid tender of performance will also discharge the contract. If the other party has not accepted the tender of performance the party who has extended the tender of performance need not perform his part of the obligation under the contract and he can claim damages for the breach of contract from the other party who has not accepted the tender of performance.

Eg. 'A' agreed to sell his T.V. to B for Rs. 5000, on the date agreed for the performance of contract A offered to deliver the T.V. to B. But 'B' refused to accept it without any valid reasons. Here, 'B' is liable to pay damages for breach of contract.

Now let us see some case laws relating to tender of performance :

1. In **Start up Vs. Mac Donald (1843)** where the defendant bought ten tons of linseed oil from the plaintiff to be delivered within the last 14 days of the month of March. The plaintiff tendered on the last of the fourteen days at 9 o'clock at night. The defendant refused to accept owing to the lateness of the hour. The defendant was held liable for breach pf contract since he refused to accept the offer of performance.

2. **In Afovos shipping co. Vs. Pagnam (1982) :** Where in an international trade contract, the agreement was that payment should reach on

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14th of the month, the court held that the defendant should have waited before repudiating the contract up to midnight of 14th day.

3. **In Ragunath Rai Vs. Jogeshwar Prashad Sharma, AIR 1999 Del 383,** where a party who promised to sell property on obtaining performance from Income tax authorities was not excused from offering performance by saying that he could not manage the clearance certificate. It was held that the contract remained alive and enforceable. The buyer had been put in possession of a part of the premises and the seller could not be allowed to take advantage of his own wrong.

7.3 PERSONS BY WHOM CONTRACT MUST BE PERFORMED (SECTIONS 40-45)

As a general rule, a contract may be performed by the promisor either personally or through any other competent person.

(i) Promisor

Section 40 of the contract Act lays down that if it appears from the nature of the case that it was the intention of the parties to any contract that any promise should be performed by the promisor himself, such promise must be performed by the promisor. This means contracts which involve the personal skill, volition or diligence of the promisor (e.g) a contract to paint a picture or to sing etc) must be performed by the promisor himself. For instance: 'A' promises to paint a portrait for 'B' for Rs. 5000/- Here A must perform his promise personally since the contract involves his personal skill.

(ii) Agent

Where personal skill of the promisor is not necessary and personal consideration is not the foundation of a contract, and the work could be done by any one, the promisor or his representative may employ a competent person to perform the contract. Thus, a contract to sell goods can be assigned by the seller to his agent. For example: 'A' promises to pay Rs. 10,000 to B. Here 'A' may perform his promise either by personally paying the money to 'B' or by causing it to be paid to 'B' by another

(iii) Legal representatives

When a contract involves the use of personal skill, it comes to an end on the death of the promisor. The rule of the law is "Actio personalis moritur cum persona" (i.e) a personal action dies with the person. In any other contract, the legal representatives of deceased promisor are bound to perform the contract (sec. 37 para 2). For example : 'A' promises to deliver goods to 'B' on a certain

day on payment of Rs. 1000/- 'A' dies before that date of performance of contract. Here A's legal representatives are bound to deliver the goods to 'B' on payment of Rs.1000/.

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(iv) Third person

When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. (section.41) The parties to a contract may agree that a third party may perform the contract in the place of the original promisor. Such an agreement is a novation or new contract which supersedes the original contract. **In Sri Sarada mills Ltd.Vs. Union of India, (1966)** 2 MLJ 16, it was observed that this section 41, applies only to executory contracts.

(v) Joint promisors

When two or more persons have made a joint promise, they are called as joint promisors. There may be contracts having joint promisors or joint promisees. In India, the liability of the joint promisors are joint and several. The joint promisors must fulfil the promise during their joint lives and if any one of them dies, his legal representatives must jointly perform the promise with the surviving promisors. The performance of contract by joint promisors are discussed below under the heading devolution of Joint liabilities and rights.

7.3.1 DEVOLUTION OF JOINT LIABILITIES (Sec. 42)

Section 42 to 45 deals with performance of contract by joint promisors. 'Devolution' means passing over from one person to another.

According to section 42, when two or more persons have made a joint promise, all such persons are jointly and severally liable to perform the promise, unless a contrary intention appears by the contract. If any of them dies, his legal representatives must fulfil the promise, jointly with the surviving promisors and after the death of the last survivor (i.e.) If all the promisors die all legal representatives of deceased promisors must perform the promise.

For example : If 'A' and 'B' promise to pay Rs. 1 lakh to 'C'. It means that both 'A' and 'B' are jointly and severally liable to pay that amount and on the death of the promisors viz., 'A' or 'B', the liability will devolve upon the legal representatives of the deceased promisor.

In **A.R. Venkataswamy Naicker.V. Jeganathan (1981) I Mad LJ 600**, a suit for specific performance of a contract of sale, it was held that the legal representatives of the defendant (who died during pendency of suit) could be brought on record unless there was a contrary intention in the contract.

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In India, joint promisors are jointly and severally (Individually) liable to perform the contract. But, under English law, the liability of joint promisors are joint but not several. According to English law, if one of the several joint promisors dies, the rights and liabilities under the contract devolve upon the surviving joint promisors alone.

Section 43 lays down three rules with regard to performance of joint promises.

(i) Anyone of the joint promisors may be compelled to perform (sec.43 Para 1)

When two or more persons make a joint promise and there is no express agreement to the contrary the promkisee may compel anyone or more of the joint promisors to perform the whole of the promise.

Illustration : 'A', 'B' and 'C' jointly promise to pay 'D' Rs.50,000/- 'D' may compel either 'A' or 'B' or 'C' to pay him that amount of Rs. 50,000/-.

(ii) Each promisor may compel contribution : (sec 43 Para 2)

When a joint promisor has been compelled to perform the whole of the promise, he may compel the other joint promisors to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Illustration : 'A' , 'B' & 'C' jointly promise to pay 'D' a sum of Rs.30,000/- 'B' is compelled to pay the whole amount to 'D'. He may recover Rs. 10,000/- each from 'A' & 'C'.

In **Bakshi Hardatt .Vs. State of Jammu & Kashmir AIR (1977)** Noc 270, it was held that where a partner of a firm was a joint promisor with other partners and if he is required to pay the debt of the firm, he is entitled to claim contribution from other partners.

(iii) Sharing to loss by default in contribution (section 43, Para 3)

If anyone of or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

But, this provision of sec.43, shall not prevent a surety from his principal, from recovering payments made by the surety on behalf of the principal or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations : 1. 'A', 'B' & 'C' are under a joint promise to pay Rs. 30,000/ to 'D'. 'C' is unable to pay anything to 'D' and 'A' is compelled by 'D'

to pay the whole amount. Here, 'A' is entitled to receive Rs. 15,000/- from B for his share.

(Space for Hints)

2. 'A', 'B' & 'C' are under a joint promise to pay D Rs. 3000/- 'A' and 'B' being only sureties for 'C'. 'C' fails to pay to 'D'. 'A' & 'B' are compelled by 'D' to pay the whole amount. Here 'A' & 'B' (sure ties) are entitled to recover it from 'C'.

Effect of release of a joint promisor: (sec . 44)

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors. It does not free the joint promisor so released from responsibility to the other joint promisor or promisors. (i.e) the released joint promisor is liable to the other joint promisors.

For example :

'A', 'B' and 'C' jointly owe a debt of Rs.15000/- to 'X'. 'X' releases 'A' from his liability and files a suit against 'B' & 'C' to recover the debt amount. Here, 'B' and 'C' are liable to pay the whole amount of Rs. 15000/- to 'X'. But, they are entitled to get Rs.5,000/- from the released joint promisor 'A' for his contribution.

But, According to English law, a discharge of one joint promisor amounts a discharge of all, unless the creditor expressly preserves his rights against them.

7.3.2. DEVOLUTION OF JOINT RIGHTS (sec. 45)

When a person has a made promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests with all the joint promisees during their joint lives. When anyone of the joint promisees dies, the right to claim performance rests with his legal representatives jointly with the surviving joint promisees and after death of the last survivor (i.e) all the joint promisees, the right rests with all their legal representatives jointly.

Illustration

'A' and 'B' jointly lend Rs. 50000/- to 'C' who promises to 'A' and 'B' jointly to repay them that is the sum with interest on a specified day. Meanwhile, 'B' dies. The right of the joint promisee to claim performance [(i.e.) repayment of Rs. 50000 by 'C'] rests with B's representatives jointly with 'A' and after the death of 'A', the right to claim performance rests with the legal representatives of 'A' and 'B' jointly.

Check Your Progress Questions

3. What is meant by devolution of joint rights?

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In a recent case of **Abhra.Vs. India Explosives Ltd (2003)** 2 ICC 157 (cal), it was held that the joint promisee and not the legatee under a will was held entitled to the amount payable under a joint term deposit.

7.4 TIME AND PLACE OF PERFORMANCE

Performance of a contract takes place when the parties to the contract fulfil the obligation. Time and place of performance of a contract are matters to be determined by an agreement between the parties themselves. The parties to a contract has to decide the time and place for performance of contract. Secs 46 to 50 lay down rules regarding the time and place of performance. 1. Where by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the promise must be performed within a reasonable time. What is reasonable time is a question of fact, to be determined with reference to a particular case, (sec 46).

2. When a promise is to be performed on a certain day and the promisor has undertaken to perform it with out application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed. (sec 47) For example : (i) A promises to deliver goods at B's warehouse on 1st January on that day, 'A' brings the goods to B's warehouse, but after the usual hour for closing it and they are not received. Here 'A' has not performed his promise. (ii) where the contract admit of several days for performance, it is sufficient if the performance is completed at any time before the end of the last day.

3. When a promise is to be performed and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business. What is proper time and place is a question of fact in each particular case. (sec. 48).

4. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, then the promisor is bound to apply to the promisee to appoint a reasonable place for performance of the promise, and to perform it at such place. (sec. 49) For Example : 'A' undertakes to deliver a thousand maunds of jute to 'B' on a fixed day. 'A' must apply to 'B' to appoint a reasonable place for the purpose of receiving it and must deliver it to him at such place.

Manner of Performance :

"The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions" (sec 50). The manner or time

prescribed by the promisee is recognised as the proper manner and time of performance. This section leaves the whole question as to the time and manner of performance upon the choice of the promisee.

(Space for Hints)

Illustration :

(a) 'B' owes 'A' Rs. 2000. 'A' desires 'B' to pay the amount to A's account with 'C', a banker. 'B' who also banks with 'C', orders the amount to be transferred from his account to A's credit and this is done by C. Afterwards and before A knows of the transfer, 'C' fails. There has been a good payment by 'B'.

(b) 'A' and 'B' are mutually indebted. 'A' and 'B' settle an account by setting off one item against another, and 'B' pays 'A' the balance found to be due from him upon such settlement. This amounts to a payment by 'A' and 'B', respectively, of the sums which they owed to each other.

(c) 'A' owes 'B' Rs. 2000. 'B' accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) 'A' desires 'B', who owes him Rs. 100 to send him a note for Rs.100 by post. The debt is discharged as soon as 'B' puts into the post a letter containing the note duly addressed to 'A'.

7.5 PERFORMANCE OF RECIPROCAL PROMISE

Section 51 to 54 deals with performance of reciprocal promises. Reciprocal promise means mutual promise between the offer-or and offeree. Section 2 (f) defines, "promises which form the consideration or part of the consideration for each other are called "reciprocal promises". For example, when 'A' makes a promise to do something to 'B' in exchange for B's promise to do something to 'A'. Here, the promises are said to be 'reciprocal promises'. A promise against a promise is a good consideration. In a reciprocal promise, both parties have double role as a promisor and promisee.

These promises have been classified by Lord Mansfield in the case of **Kingston.Vs. Preston (1733)** as follows.

(i) Mutual and concurrent promises

Where the promises of both parties (bilateral promises) are to be performed simultaneously, they are said to be mutual and concurrent promises.

(ii) Mutual and dependant

When the performance of promise by one party depends upon the promises of the other party, it is called as mutual and dependant reciprocal promises.

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(iii) Mutual and independent

When both party's promises are independent and is not dependent on each other's promise, it is called as a mutual and independent promise. In such cases, each party must perform his promise independently and irrespective of the fact whether the other party has performed his promise or not.

The rules regarding performance of reciprocal promises have been contained in sections 51 to 54 & 57 of the Indian contract Act.

(i) Simultaneous reciprocal promises (sec. 51)

Section 51 provides that when a contract consists of reciprocal promises to be simultaneously performed, the promisor need not perform his part of promise unless the other party (i.e) the promisee is ready and willing to perform his part of reciprocal promise.

For example: 'A' agreed to deliver certain goods to 'B' to be paid for by B on delivery. Here 'A' need not deliver the goods, unless 'B' is ready and willing to pay for the goods on delivery. Likewise, 'B' need not pay for the goods unless 'A' is ready and willing to deliver them.

(ii) Order of performance of reciprocal promises (sec. 52)

According to sec 52, where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they must be performed in that order.

If such order of performance is not expressly fixed in the contract, it may be performed in that order which the nature of the transaction requires.

For example

'A' and 'B' entered into a contract that 'A' shall build a house for 'B' for Rs. 5 Lakhs. Here A's promise to build the house must be performed before B's promise to pay for it.

(iii) Effect of perventing performance of reciprocal promise (sec. 53)

When a contract contains reciprocal promises and one party prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented and he is entitled to compensation from the other party for any loss in consequence of the non-performance of the contract.

Check Your Progress Questions
2. What are reciprocal promises?

For example : 'X' and 'Y' entered into a contract that 'Y' shall execute certain work for Rs. 2 lakhs. 'Y' is ready and willing to execute the work accordingly. But 'X' prevents him from doing so. The contract is voidable at the

option of 'Y'. Here, 'Y' is entitled to recover compensation from 'X' for any loss which he has incurred by the non-performance of the contract.

In Elias. Vs. Govind ILR (1903) where a principal prevented the agent from completing the negotiations already started, it was held that the agency is voidable and the agent can recover the commission.

(iv) Effect of default as to promise to be first performed. (sec. 54)

Where in case of reciprocal promises, the nature of the promise is such that one of them cannot be performed till the other party has performed his promise, and if the other party fails to perform his promise, he cannot claim performance of the reciprocal promise from the first party and he must also make compensation to the first party to the contract for any loss which the first party may sustain by the non-performance of the contract.

For example :

'A' enters into a contract with 'B' to execute certain builder's work for a fixed price. 'B' supplying the scaffolding and timber necessary for the work If 'B' refuses to supply any timber and the work cannot be executed. Here 'A' need not be execute the work and 'B' is bound to make compensation to 'A' for any loss caused to him by the non-performance of the contract.

In the case of **Jabalpur cable Network (p) Ltd .Vs. ESPN software India (p) Ltd [AIR 1999** MP 271], under a contractual arrangement, the respondent was to supply to the appellant TV signals and the appellant was to supply them to cable operators after decoding. The appellant informed the supplier that it was discontinuing the service to cable operators because of non-payment by them and that it would also not to be able to pay to the supplier. So, the supplier stopped sending the signals, and the supplier subsequently brought an action for damages for the un-expired period of the agreement which was not used by the appellant.

The court said that sec.54 of the contract Act would not help the supplier since he acquiesced in the act of the appellant and stopped sending signals.

Reciprocal promises to do things legal and also other things illegal (sec. 57)

Where persons reciprocally promise, firstly to do certain things which are legal and secondly, under specified circumstances, to do certain other things, which are illegal, the first set of promises is a valid contract, but the second is a void agreement. [this is elaborately discussed earlier in the chapter "Legality of object"].

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Illustration

'A' and 'B' agree that 'A' shall sell a house to 'B' for Rs. 50000/- but if 'B' uses it as a gambling house, he shall pay Rs. 2 lakhs for it.

Here, the first set for reciprocal promises, viz to sell the house and to pay Rs.50000/- for it, is a valid contract. The second set is for an unlawful object viz, that 'B' may use the house as a gambling house is a void agreement.

(vi) Alternative promise one branch being illegal (sec. 58)

In the case of an alternative promise, one branch of which is legal and the other is illegal, the legal branch alone can be enforced.

For example : 'A' and 'B' agree that 'A' shall pay Rs. 10000/- to 'B', for which 'B' shall afterwards deliver to 'A' either rice or smuggled opium. Here this is a valid contract to deliver rice and is a void agreement as to opium.

7.6 TIME AS THE ESSENCE OF THE CONTRACT

When a party to a contract fails to perform his obligation on the day, or within the time, agreed upon by the parties, can the other person rescind the contract? That is whether time is the essence of the contract? If time is the essence, then the other party is entitled to rescind the contract, or else he cannot rescind the contract and is entitled to claim compensation only for the loss caused by such failure.

Sec. 55 deals with elaborately the question of when time as the essence of the contract. If there is a failure on the part of the promisor to perform his obligation within the fixed time, the contract (or so much of it as remains unperformed) become void-able at the option of the promisee. The contract does not automatically get determined., and the promisee must expressly determine it. 2. Where time is not the essence of contract, failure on the part of promisor to perform his obligation, within the fixed time does not render the contract void able, but the promisee entitled to compensation from the promisor for any loss occasioned to him by the such failure. 3. Where time is of the essence of contract, if the promisee accepts performance of such promise after the fixed time, he cannot claim compensation for any loss occasioned by the non-performance of the promise at the agreed time. But if the time of accepting the delayed performance, he gives notice to the promisor or his intention to do so, he can claim compensation. Time is of the essence of a contract is essential within the specified in the agreement for the performance of a promise does not necessary lead to the conclusion that the time fixed is of the essence in a contract. Generally

Check Your Progress Questions

4. When is the time the essence of contract?

in commercial contracts time is of the essence of the contract. In other contracts it is not so. For example, In a contract of a sale of immovable property, time is of the essence unless it is shown that the intention of the parties was that should be the essence of the contract, **(Badrauddin. Vs. Tufail Ahmed (A.I.R 1963 M.P. 31)**

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7.7. APPROPRIATION OF PAYMENTS (Rule in Clayton's case)

Appropriation means 'adjusting the payments towards the debts. When a debtor owes several distinct debts to a creditor and makes a payment insufficient to satisfy the whole indebtedness, the question may arise as to which particular debt the payment is to be adjusted or appropriated. The answer to this question is explained in the early English decision in **Clayton's case (1816).**

In this case, one of the partner's of a firm with which Clayton had an account died. The balance due to Clayton at that time was 1713 Euro. The surviving partners subsequently paid to Clayton more than that amount while Clayton himself made further, deposits with the firm. The firm became insolvent. Clayton sought to recover also from the estate of the deceased partner. It was held that the estate of the deceased partner was not liable to Clayton as the payments made by the surviving partners to Clayton must be recorded as completely discharging the liability of the firm to Clayton at the time of the particular partner's death. As a general rule, the amounts paid or to be set off against the debts in the order of time. However, the debtor has the right to indicate to which debt the payment should be appropriated. If the debtor has not given any indication. The creditor can apply the amount towards payment of any lawful debt.

In Clayton's case, **Sir William Grant'** has laid the general principles applicable in regard to the appropriation of payments, when a debtor owes to the same creditor several debts and has made a payment. They are as follows :

a) The debtor has a right to direct to which particular debt, the payment should be applied.

b) If he omits to give any directino, the creditor has the option to appropirate it towards any debt due at the time.

c) If the creditor neglects to exercise his option, the payment should be set off against the debt in order of time.

All those rules were embodied in sections 59 to 61 of the Indian contract Act, with certain modifications. They are as follows.

Check Your Progress Questions

5. Who can offer performance of a contract?

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(i) Appropriation by the debtor (sec.59)

Where a debtor owes more than one debt to his creditor and pays him a sum of money which is insufficient to discharge the entire debt, the debtor has a right to appropriate it either expressly or by implication towards any debt due to his creditor. If the debtor expressly intimates at the time of actual payment that the payment should be applied towards the discharge of a particular debt, the creditor must do so.

For example (1) 'A' owes to 'B' among the other debts the sum of Rs. 50,000/- upon a promissory note, which falls due on 30th August. He owes B, no other, debt of that amount. On 30th August, 'A' pays 'B' Rs. 50,000/-. Here, the payment is to be applied to the discharge of the promissory note.

(2) 'X' owes to 'Y' Rs. 20,000/-, 50,000/-, 60,000/- borrowed in three different occasions. 'X' send Rs. 50,000/- to 'Y' asking him to adjust it towards the second debt. Here, the creditor 'Y' is bound to appropriate it towards the second debt.

In **Croft Vs. Lumley (1858), Lord Campbell** observed that, "there is an established maxim of law that, when money is paid, it is to be applied according to the expressed will of the payer, not of the receiver".

(ii) Appropriation by the creditor (section 60)

According to section 60, 'where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor. It is immaterial whether its recovery is or is not barred by the law of limitation'. Therefore if at the time of paying the money, the debtor has not given any express or implied direction as to which particular debt the payment was to be appropriated, then the creditor gets the right to appropriate it towards any lawful debt. However, the creditor cannot adjust the payment towards a disputed or illegal debt. But, he may appropriate it to a debt which is barred by law of limitation.

For example

'A' owes to 'B' Rs. One lakh as the principal amount and Rs. 9,000/- as interest. 'A' repays B Rs. 5000/- without stating whether the said amount is to be adjusted to the principal amount or interest. Here, under section, 60, the creditor 'B' can appropriate the amount in any manner. [(i.e.) either in the principal amount or in interest].

iii) Appropriation by law : (section 61)

Under section 61, where neither party (debtor or creditor) makes an appropriation, the payment shall be applied in discharge of the debts in order of time, not with standing that some of them are barred by limitation. Therefore, when the debtor does not expressly intimate and the creditor fails to make any appropriation, the payment shall be applied in discharge of the debts in chronological order. If all the debts are of equal standing, the payments will be distributed between all the debts proportionately.

Examples :

'A' owes B, two debts of Rs. 20000 each which are time barred and another debt of Rs. 40,000 to 'B'. 'A' sends Rs. 20,000. But he neither makes any appropriation. Here Rs. 20,000 would be appropriated against the two debts of Rs. 20,000 each which are time barred (ie) Rs. 10,000/- would be appropriated against each debt.

In **S.N. Misrimall Vs. Radha Krishnan, AIR 1972, Mad 108,** where the ledgers and day books should that debts and credits were made seriation and the defendant had not instructed the plaintiff to appropriate the sum towards any particular debt and the plaintiff had also not made any appropriation towards any particular debt. It was held that under sec. 61 the debts would be discharged in the order of time by the credits whether the debts were or were not barred by limitation.

7.8. CONTRACTS WHICH NEED NOT BE PERFORMED

Sections 62 to 67 of the contracts Act, deals with contracts which need not be performed. The relevant provisions are as follows.

(i) When its performance becomes impossible (sec. 56).

(ii) If the parties to a contract agree to novation, rescission or alteration, the original contract need not be performed (sec.62).

(iii) The promisee may dispense with or remit performance by the promisor in whole or in part or may extend the time for the performance or may accept any satisfaction in lieu there of (sec.63).

(iv) When a voidable contract is rescinded, the other party need not perform his promisee (sec.64)

(v) Where the failure of performance has been caused by the promisee's refusal, or neglects the promisor will be excused (sec.67)

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For example : 'A' contracts with 'B' to repair B's house. 'B' neglects or refuses to point out to 'A', the places in which his house requires repairs. Here 'A', is excused for the non-performance of the contract, if it is caused by such neglect or refusal by 'B'.

(a) Novation (Sec. 62)

If the parties to an existing contract agree to substitute the existing contract with new one, it is known as novation. For example : 'A' owes 'B' £ 100 and 'B' owes 'C' £ 100 and all the three persons meet and it is agreed that 'A' shall pay 'C' the £ 100; Here, B's debt is discharged and 'C' may recover the sum against 'A'.

Section 62 deals with the effect of novation, rescission and alteration of a contract. Under sec. 62, "If the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed".

Illustration

(i) 'A' owes money to 'B' under a contract. It is agreed between 'A', 'B' and 'C' that 'B' shall hence forth accept 'C' as his debtor; instead of 'A'. Here, the old debt of A to B is at an end, and a new debt from C to B has been contracted.

(ii) 'A' owes 'B' Rs. 10,000/-. 'A' enters into an arrangement with 'B' and gives 'B' a mortgage of his estate for Rs. 5000 in the place of the debt of Rs. 10,000/-. This is a new contract and it extinguishes the old one.

(b) Remission of performance : (Sec. 63)

Under Sec. 63 every promise may dispense with or remit wholly or in part, the performance of the promise made to him or may extend the time for such performance, or may accept instead of any satisfaction which he thinks fit.

Illustration :

'A' promises 'B' to paint a picture for 'B'. 'B' afterwards for bids him to do so. Here, 'A' is no longer bound to perform the promise.

7.9. ASSIGNMENT OF CONTRACTS

The word 'assignment' means transfer Assignments of a contract means transfer of contractual rights and liabilities by a party to a contract to a third party with or without the concurrence of the other party to the contract.

The Indian law does not specifically deals with the assignment of a contract. The general principle of the law is that a third person can neither sue

nor to be sued in the case of contract, but under certain circumstances, a contract may be assigned either (i) by act of parties (ii) by operation of law.

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7.9.1. ASSIGNMENT BY ACT OF PARTIES

The burden or liability of a contract cannot be assigned without the consent of the other party to a contract. (i.e) a promisee cannot be compelled by the promisor or by any other party to expect the performance of the contract from any person other than the promisor. Assignment is said to take place by an act of the parties when they themselves make the no assignment. If there are obligations involving personal qualifications there can be no assignment of even the benefit under a contract. **(Griffith.Vs. Tower publishing Co (1877).**

(a) Assignment of contractual obligations

It is subject to the following rules.

(i) Contractual obligations involving personal skill or ability cannot be assigned (sec.40)

As already stated, when a contract involves any personal skill or ability of the promisor, his legal obligations under the contract cannot be assigned to others. For example: a contractual obligation by an opera signer to sign or by a film actor to act in a film or a contract to paint a picture cannot be assigned.

(ii) A promisor cannot assign his liabilities or obligations under a contract.

A promisee cannot be compelled by the promisor or a third party to accept any person other than the promisor as the person liable to him on the promisee. The rule is based on sense and convenience. The promisee in a contract is entitled to know to whom he is to look for the satisfaction of his rights under the contract.

For example : If 'A' owes Rs. 10,000/- from 'B' and is owed the same amount by 'X'. A cannot ask 'B' to recover the amount from 'X' unless 'B' accepts the performance from 'X'.

In the case of **Robson & Sharpe. Vs. Drummond (1831),** the defendant Drummond hired a carriage from Sharpe at a yearly rent for five years and Sharpe undertook, to paint the carriage every year and to keep it in repair. Robson was the partner of sharpe, but the contract was made with Sharpe alone. After three years, Sharpe retired from business and Drummond was informed that Robson would paint and repair the carriage and receive payment. Drummond refused to deals with Robson and returned the carriage. Held that, he was entitled to do so.

Limitations to the rule

(i) It is open to a party to have the contract performed through the agency of a competent person provided the contract does not expressly or

Check Your Progress Questions

6. What is meant by assignment of contract?

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impliedly contemplate performance only by the promisor. However, the original party remains liable for the proper performance of the obligations under the contract. For example: If 'A' undertakes to do some work for 'B' which needs no special skill, 'B' cannot complain if 'A' gets the work done by an equally competent person.

(ii) **Novation :** Another circumstance in which an assignment of a burden or liability of a contract is recognised is novation. The promisor may transfer his liability with the consent of the promisee and of the transferee. In such case, novation takes place. Novation is the substitution of a new contract for an existing one between one of the parties and a third party. The discharge of the old contract on the same terms being the consideration for the new one. It can take place only by the tripartite agreement between the parties.

For example : 'A' owes Rs. 10000. 'A' enters into an agreement with 'B' and gives 'B' a mortgage of his estate for Rs. 5000/- in place of the debt of Rs.10000/-. This is a new contract and extinguishes the old one.

(b) Assignment of contractual Rights

The Assignment of contractual rights are subject to the following rules.

(i) The rights and benefits under a contract not involving personal skill may be assigned, subject to all equities between the original parties. This means that when sued by the assignee, the debtor can raise against the assignee all defences that he could have raised against the assignor at the time he received notice of the assignment.

For example : 'A' bought certain goods from 'B' for Rs. 10000/-. The goods were defective and therefore 'B' promptly offered to return the goods. 'B' refused to take the goods back and assigned the debt of Rs. 10000 to C. 'C' sued 'A' for Rs. 10000/-. A can set up as a defence against 'C' the defective character of the goods.

(ii) **An actionable claim can always be assigned,** but, the assignment to be complete and effectual must be effected by an instrument in writing. Notice of such assignment must also be given to the debtor.

An actionable claim is defined in section.3 of the transfer of property Act, 1882, as "a claim to any debt (except a secured debt) or to any beneficial interest.....whether such claim or beneficial interest be existant, accruing conditional or contingent".

The benefits of a contract before breach takes place is assignable. It is called an actionable claim. The mode of transferring an actionable claim laid down in section 130 of the transfer of property Act, 1882.

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Under English law, it is called as **chose in action** (i.e) a contractual right is called as chose in-action. An assignment of such a right is called the assignment of chose-in-action. The common law did not permit the assignment of chŏse-in action. But, equity permitted assignment of contractual rights. Chose in action means a claim which can only be enforced by an action in a court of law. For instance, pro note, bill of exchange, cheques, patent rights, copyright, policies of insurance, shares in company are all chose in action (i.e) actionable claim.

Under English Law, Contractual rights may be assigned subject to the following conditions :

(i) The assignment must be in writing.

(ii) It must be signed by the assignor.

(iii) It must be absolute.

(iv) The assignee must give express notice in writing of the fact of assignment to the promisor.

(v) The benefit sought to be assigned should not be coupled with any liability that the assignor is bound to fulfil.

If an assignment satisfies the above conditions, it is valid in law and is called a **'Legal assignment'.** If all the above conditions are not satisfied, but where the intention to assign is clear, it is called an **'Equitable assignment'** and it is valid in equity.

According to **Anson,** "A promisor cannot assign his liabilities under a contract or conversely, a promisor cannot be compelled by the promisor or by a third party to accept any liability but the promisor is the person liable to the promisee".

In British Wagon Co Ltd. Vs. Lee & Co (1880 Q .B), One Parkgate Wagons agreed to let some railway wagons to the defendant and to keep them in repair. The company assigned the benefit as well as the liabilities under the agreement to the British Wagon Co. It was held that the repairing of a railway wagon can be done by any ordinary workman. Personal care and skill was not an ingredient in the contract and the contract could be vicariously performed.

7.9.2. ASSIGNMENT BY OPERATION OF LAW:

An assignment of a contract can take place by operation of law viz, by purchase or lease of interest in land or by death or bankruptcy. Such assignment take place by intervention of law in the following cases.

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(i) Death : On the death of a party to a contract, his rights and liabilities under the contract, (except in the case of contracts involved personal skill or service) devolve upon his heirs and legal representatives.

(ii) Insolvency (or) bankruptcy : In case of insolvency of a person, his rights and liabilities incurred pass to the official receiver or assignee, who are appointed by court.

7.10 SUMMARY

From this chapter, we hope that you can understood the legal rules relating to performance of a contract. This chapter clearly explains the concept of Tender of performance, Devolution of joint liabilities, performance of reciprocal promises and appropriation of payments. Further, we have elaborately discussed about the assignment of contract and the contracts which need not be performed according to contracts Act, and this chapter clearly describes as to when the time is essence to a contract and when the time is not essential to a contract. Moreover, Many illustrations and case laws are given for your easy understanding of this subject.

7.11 KEYWORDS

1.	Assignment -	a transfer of legal riht or title or interest; Allotting to a particular person a responsibility.
2.	Appropriation-	Anything appropriated for a specific purpose especially money.
3.	Diligence -	Earnestness in working; careful and active about
4.	Devolve -	To dedicate completely; to setaside for
5.	Reciprocal -	Mutual; Interchangeable
6.	Scaffold -	a structure made of scaffolding for workers to stand on when they are working high up on the outside wall of a building
7.	Survivor -	Be alive after, continue to exist; one who has lived beyond.
8.	Volition -	Free will; power of determination.

7.12 ANSWERS TO CHECK YOUR PROGRESS

For Question No.1 ... Refer Section No. **7.2**

Question No.2 ... Refer Section No. **7.5**

Question No.3 ... Refer Section No. **7.3.2**

(Space for Hints)

Question No.4 ... Refer Section No. **7.6**

Question No.5 ... Refer Section No. **7.7**

Question No.6 ... Refer Section No. **7.9**

7.13 EXERCISE QUESTIONS

(A) Short Answer questions

1. State briefly the provisions of the contract Act, relating to the time and place of performance of contract.
2. Summarize the rules as to the appropriation of payments made by a debtor to his creditor?
3. State the rules as to the devolution of joint rights and liabilities.
4. **Write shorts Notes on**
   a) Reciprocal promises
   b) Tender or offer of performance
   c) Assignment of contract
   d) Rule in Clayton's case
   e) Time as the essence of contract

(B) Long answer questions

1. Explain the term 'tender'. What are the essential requisites of a valid tender of performance and state the effect of refusal to accept a tender.
2. What do you understand by performance of contract? Under what circumstances a contract need not be performed?
3. When is time deemed to be the essence of a contract in the performance of contract? Discuss.
4. What do you mean by assignment of contracts? What conditions should be fulfilled for assignment of contracts? What is assignment by act of parties and operation of law?

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UNIT – 8
DISCHARGE OF CONTRACT

INTRODUCTION

A contract once formed , it does not bind the parties indefinitely. There are legally recognized modes by which the parties can discharge the contract. Discharge the contract means termination of the contractual relationship between the parties. A contract is said to be discharged when it ceases to operate, that is when the rights and obligations created by it comes to an end.

A contract may be discharged by anyone of the following methods (i) by performance of obligation (ii) by agreement (iii) by breach (iv) by impossibility of performance (Frustration) (v) by lapse of time and (vi) by operation of law. In this Chapter, let us see these methods of discharge of contract and the remedies for breach of contract.

UNIT OBJECTIVES

- ❖ To understand the meaning of discharge of contract
- ❖ To learn about the various modes for discharge of contract
- ❖ To analyse the doctrine of frustration
- ❖ To know the various remedies for breach of contract.
- ❖ To study about the concept of 'Quantum meruit'

UNIT STRUCTURE

8.1 Various Modes of discharge

8.2 Discharge by performance

8.3 Discharge by agreement

8.4 Discharge by impossibility

8.5 Discharge by lapse of time

8.6 Discharge by operation of law

8.7 Discharge by breach of contract

8.8 Remedies for breach of contract

8.9 Summary

8.10 Key words

8.11 Answers to check your progress

8.12 Exercise questions

8.1. VARIOUS MODES OF DISCHARGE

Discharge of contract means termination of the contractual relationship between the parties to a contract. A contract is said to be discharged when the contracting parties are freed from performing their respective obligations arising from the contract. After the formation of a contract, the next stage is reached, namely, the fulfillment of the object which the parties had in mind. When the object of the contract is fulfilled the liability of the either party under the contract comes to an end. The contract is then said to be discharged.

A contract may be discharged in many ways. This topic has not been dealt with at one place in the contract Act. The provisions relating to this chapter are given in many sections of the contract Act.

According to the Indian contract Act, the following are the various modes in which a contract may be discharged.

1. By performance (Sec.37, 38)
2. By agreement (Sec.62, 63)
3. By impossibility (sec.56)
4. By lapse of time
5. By operation of law
6. By breach of contract (Sec.39)

Now, let us see these various modes of discharged of contract in detail.

8.2. DISCHARGE BY PERFORMANCE

The parties to a contract must perform their respective promises. If the parties to the contract performed their obligations under the contact, the contract will be discharged. According to sec.37 of the contract Act, "the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of the act or any other law". The normal method of discharge of a contract is when both the parties perform their obligations under the contract. Then, both the parties are free from any further liability under the contract and their contractual relationship comes to end. There must be a complete and proper performance. The performance of a contract in order to be complete must be made in accordance with the terms of the contract. If only one party performs the promise, he alone will be discharged. Such a party gets a right of action against the other party for breach of contract.

Check Your Progress Questions

1. In how many ways a contract may be discharged ?

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Sec. 37 of the contract Act provides that the parties to a contract must either (i) perform their respective promises or (ii) offer to perform the same. This means the performance may be either actual or attempted performance.

(i) Actual performance

When both the contracting parties perform their promises the contract is discharged. This is known as actual performance of contract. The performance must be complete, precise and according to the terms of the agreement. Generally most of the contracts are discharged by actual performance.

(ii) Attempted performance or tender of performance (Sec.38)

The starting point of the performance of a contract is the tender of performance. Tender means an offer of performance by the promisor. Tender is not actual performance; but is only an offer to perform the obligation under a contract by the promisor.

Tender of performance is also called as "**Attempted performance**". Thus tender of performance is an expression made by the promisor to the promisee about his willingness to perform his part of the obligation under a contract.

Tender of performance is equivalent as performance itself. Just like an actual performance discharges a contract, a valid tender of performance will also discharge of contract.

When the promisor has made an offer of performance and the offer has been refused by the promisee, then the promisor is not responsible for non performance of contract and he can claim damages for the breach of contract from the promisee.

Section 38 of the contract Act deals with 'tender'. According to this section, where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Let us illustrate the same.

'A' is bound in deliver 10 bags of rice to 'B' on a particular day and 'B' has to pay Rs 10,000/- for it. If on the appointed day and at the appointed place. 'A' offers to deliver 10 bags of identical quality of rice to B, he is said to make a tender of performance. If such performance is not accepted 'B' is liable to pay damages, as 'A' has performed his part.

Liability of legal Representatives

A contract which involves the use of personal skill, must be performed by the promisor himself and such type of contract is discharged (i.e) comes to an end on the death of the promisor.

As regards any other contract, the legal representatives of the deceased promisor are bound to perform it in case of death of such promisors before performance, unless a contrary intention appears from the contract. (Sec.37, para2)

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Illustration

1. 'A' promises to paint a picture for 'B' by a certain day at a certain price. 'A' dies before the day. The contract cannot be enforced either by A's representatives or by 'B'.

2. 'A' promises to deliver goods to 'B' on a certain day on payment of Rs.1000. A dies before that day. A's representatives are bound to deliver the goods to 'B' and 'B' is bound to pay Rs.1000/- to A's representatives .

(The provisions relating to performance of contract are discussed in detail in earlier chapter (Refer Unit 7)

8.3. DISCHARGE BY AGREEMENT

If the parties are entering into a new contract on the basis of the original contract then the original contract will be discharged and the new contract will prevail. The rights and obligations created by an agreement can be discharged without their performance by means of another agreement between the parties. The rule of law in this regard is explained in the legal maxim '**Eodem mod quo quid constituitur,eodem mode destruitur'** Which means a thing may be destroyed in the same manner in which it is constituted (i.e) a contractual obligation may be discharged by subsequent agreement.

The various cases of discharge of contract by mutual agreement are dealt in Sec. 62 & 63 the contract Act.

Sec 62 defines, "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Thus, section 62 deals with the effect of novation, rescission and alteration of a contract.

8.3.1. (A) NOVATION

Novation is one mode of discharging a contract. 'Novation' means substitution of a new contract, in the place of an existing contract. If the parties to an existing contract agree to substitute the existing contract with a new one, it is known as 'Novation'

Novation is clearly explained in the well known case of **Scarf .Vs. Jardine (1882),** in the following words. " .... there being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the old contract will be discharged'.

Check Your Progress Questions

2. What is Novation ?

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Thus, Novation takes place when (i) a new contract is substituted for an existing one between the same parties; or (ii) a contract between two parties is rescinded in consideration of a new contract being entered into on the same terms between one of the parties and a third party)

To apply the principle of Novation the new contract must be supported with consideration and there must be mutual consent of all the parties concerned.

Examples :

1. 'A' owes 'B' Rs. 10,000/- 'A' enters into an agreement with 'B' and gives 'B' a mortgage of his estate for Rs. 5000/- in place of the debt of Rs. 10,000/-. This is a new contract and extinguishes the old.

2. 'A' owes sum money to 'B' under a contract. It is agreed between 'A', 'B' and 'C' that 'B' shall hence forth accept C as his debtor instead of 'A'. The old debt of 'A' to 'B' is at an end and a new debt from 'C' to 'B' has been contracted.

Thus the novation is of two kinds, namely, (1) a novation involving change of parties; and

(2) a novation involving substitution of a new contract in place of the old one.

The requisites of a valid novation is

(i) the new contract must be one which is capable of being enforced by law. If the new contract is not enforceable the parties shall be bound by the old contract.

In **Shankerlal Damodhar .Vs. Ambalal Ajaipal (AIR 1946)** an old mortgage was replaced by a new mortgage; but the parties failed to register the new mortgage. Hence it is unenforceable. It was held that the parties are bound by the original mortgage.

(ii) The novation should take place before expiry of the time of the performance of the original contract. If it does not made , there would be a breach of the contract.

The substitution of a new contract is not possible after breach of the original contract. In that case the original contract can be sued upon.

In the case of **Manohar Koyal .Vs. Thakur Das Nasker (1888) 15, Cal, 319,** the plaintiff sued to recover some of Rs. 1,173 due on a bond. After the date of the bond, the plaintiff agreed to accept Rs. 400 in cash and a new bond of Rs.

700 payable by installments. But, subsequently the defendant neither gave Rs.400 nor the bond. So, the plaintiff, there upon sued him on the original bond.

The Calcutta high courts held that the original contract was discharged not by novation but by breach and the plaintiff was entitled to sue for the breach of the original contract.

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8.3.2. (B) RESCISSION

'Rescission' means cancellation of the contract. If the parties to a contract agree to rescind it, original contract need not be performed and it discharged.

Rescission of a contract takes place when all or some of the terms of the contract are cancelled. It may occur, (i) by mutual consent of the parties or

(ii) where one party fails in the performance of his obligation, the other party can rescind the contract without prejudice to his right to claim compensation for the breach of contract.

(iii) In a voidable contract, one of the parties has the option of rescinding it,

Thus rescission occurs when each party to a contract surrenders his contractual rights and releases the other party from his contractual obligations.

Examples

1. 'A' promises to supply certain goods to 'B' on certain date. Before the actual date of performance, 'A' and 'B' mutually agree that the contract will not be performed. Here the contract is rescinded and discharged.

2. 'A' induces 'B' to enter into an agreement by coercion. Here, the contract is voidable at the option of B. 'B' can rescind the contract.

Section 64 of the contract Act defines consequences of rescission of voidable contract. Sec.64 provides that, when a person at whose option a contract is voidable rescinds it, the other party is discharged from liability under the contract. However, if the party rescinding a voidable contract has received any benefit from the another party to such contract, he must restore such benefit, so far as may be, to the person from whom it was received.

Section 66 of the contract Act explains the mode of communicating or revoking rescission of voidable contract. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication, or revocation of a proposal.

Rescission may be total or partial. Total rescission is the discharge of the entire contract.

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Suit for rescission

Section 35 of the specific relief Act, provides that, Any person interested in a contract in writing may sue to have it rescinded. The court may grant rescission in the following cases.

(i) when the contract is voidable or terminable by the plaintiff.

(ii) when the contract is unlawful for cases not apparent on its face and the defendant is more to blame than the plaintiff.

8.3.3. C) ALTERATION (Sec.62)

It means a change in one or more of the terms of a contract. Alteration of a contract may take place when one or more of the terms of the contract are altered by the mutual consent of the parties to the contract. In such cases, the old contract is discharged. Alteration is valid only if it is done with the consent of all the parties to the contract. In alteration, unlike novation, there is change in the terms of the contract but no change of the parties.

Example

'A' enters into a contract with 'B' for the supply of 200 bales of cotton at his godown on 1st July 2009. later, both 'A' and 'B' agree to postpone the date of delivery to 1st September 2009. This change in the terms of the contract amounts to alteration of contract.

8.3.4. (D) REMISSION

Section 63 of the contract Act deals with remission. 'Remission' means acceptance of a lesser fulfillment of the promise made. It is a unilateral act of the promisee discharging at his will and pleasure, the obligation of the promisor. Section 63 deals with the cases where the promisee may dispense with or remit the performance of promise by the promisor. Under sec.63. "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him or may extend the time for such performance of the promise or may accept any other satisfaction instead of performance, which he thinks fit.

Illustrations:

1. 'A' promises to paint a picture for 'B'. 'B' afterwards forbids him to do so. Here 'A' is no longer bound to perform the promise.

2. 'A' owes 'B' Rs.10,000/-. 'A' pays to 'B' Rs 5,000/- and 'B' accepts it in satisfaction of the whole debt. Here, the whole is discharged.

Check Your Progress Questions

3. What is meant by Remission ?

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3. 'A' owes 'B' Rs 5000/-. 'C' pays to 'B' Rs 1000/- and 'B' accepts them in satisfaction of his entire claim on 'A'. this payment is a discharge of the whole claim.

The acceptance of less sum of money where more is due, is a good discharge of the whole of the liability. The supreme court decision in **Kapurchand Godha .Vs. Mir Nawab Himayatali Khan AIR 1963, SC 250,** The defendant who was the prince of Bernar being the son of the Nizam of Hydrabad, had purchased various jewels worth of 27 Lakhs from a firm in Bombay and executed promissory notes in favour of the seller. After the military occupation of Hyderabad, the prince's Debt settlement committee set up by the Governor and it offered 20 Lakhs to the creditor in full satisfaction of the claim of 27 Lakhs and also accepted it. Afterwards the creditor sued the debtor for the balance.

It was held that the appellant (creditor) having accepted the payment in full satisfaction of his claim was not afterwards entitled to sue the promisor.

In England a person cannot remit the performance unless the fresh promise is supported by consideration. On the other hand in India, a promisee may remit or give up a part of his claim and a promise to do so it binding even though there is no consideration for doing so.

An important difference between section 62 and 63 is that the former which provides for novation. (i.e) a new agreement will require some consideration. But under Sec.63. the promisee may gratuitously release the promisor from the obligation ton perform the promise.

Under sec. 62, novation agreement must be made before the breach of the original promise. But, under Sec. 63, the promisee may, even after breach, release the promisor from his liability arising on such breach.

8.3.5. E) ACCORD AND SATISFACTION

Accepting any other satisfaction than the performance originally agreed is known in 'English law as accord and satisfaction. In India, the rule of 'accord and satisfaction' has no application. 'Accord means' a promise or understanding to accept less than what is due under the contract. 'Satisfaction' means actual payment or performance of the lesser obligation.

If the party bound performed something other than that which was required by the original promise and the promisee consented to that, that would act as a valid discharge of the promisor's obligation. This principle is known as accord and satisfaction. It is therefore, an agreement between two parties; one of whom has a right of action against the other that the letter should do or give anything

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and the former accepts something in satisfaction of the right of action. The agreement is the accord and the satisfaction is the consideration for it.

Once the promisee accepts such satisfaction as discharge of the original obligation, the obligation is discharged. Under section 63, a promisee may accept instead of the performance of the promise made to him any satisfaction which he thanks fit.

For example:

'A' owes 'B' Rs 2000. subsequently 'B' agrees to accept Rs. 1000/- in full satisfaction of his whole debt. This agreement to ay Rs.1000/- is an accord and the actual payment is the satisfaction. Here the payment of Rs.1000/- discharges the whole debt.

In the case of **Salima Jabeen .Vs. National Insurance Co Ltd AIR 1999 J&K.110,** where in a claim under a five insurance policy, the policy holder accepted an amount by way of full and final satisfaction of his claim on the basis of the second surveyor report. Hence, the insurance its liability.

An illegal contract cannot support an accord and satisfaction.

Limitations:

The doctrine of accord and satisfaction is subject to two limitations viz,

(i) the consideration must be executed and

(ii) **The rule in pinnel's case:**

The rule is that the payment of a lesser sum of money can be no consideration for the release of a debt for a larger amount was established by the **Pinnel's case (1602)**. A part payment of a debt cannot operate as a satisfaction of the whole debt.

The fact of the Pinnel's case and the exceptions to the rule in Pinnel's case are already discussed in earlier chapter (Refer Unit - 3)

8.3.6 (F) WEAVER

It means the abandonment of rights which a person is entitled to. An agreement discharging the previous contract may take the form of waiver. A party to a contract may waive his rights under the contract, and thereby the other party is released from his obligation. Wavier takes place when the parties to a contract agree that they shall no longer be bound by the contract. This amounts to a mutual abandonment of rights by the parties to the contact. The consideration is not necessary for waiver. Thus, by waiver of the right available under a contract or giving up the claim, there can be a valid discharge of contract.

Examples:

(Space for Hints)

1. 'A' promises to paint a picture for 'B'. 'B', later on forbids him to do so 'A' is no longer bound to perform the promise.

2. 'A' gives a loan of money to 'B' Here, 'A' has the right to recover the money from 'B'. But, he waives or gives up his right of claim. Hence, the contract is discharged.

8.4 DISCHARGE BY IMPOSSIBILITY

Impossibility of performance or Frustration (Sec.56)

Impossibility of performance is one of the modes in which a contract is discharged. If an agreement contains an undertaking to perform an impossible act, it is void ab initio. Law does not compel anyone to do an impossible act. If an agreement becomes impossible to perform, it is discharged. The rules relating to impossibility of performance is based on the following maxims.

1. **Lex non cogit ad impossibilia** which is impossible does not recognize what is impossible.

2. **Impossibilium nulla obligato est,** (i.e) what is impossible does not create an obligation.

Section 56 of the contract Act defines, 'an agreement to do an act impossible in itself is void'.

Impossibility may appear on the face of the contract or may exist unknown to the parties at the time of making the contract or may arise subsequently after the contract is made.

The law relating to impossibility of performance is laid down in section.56 of the contract Act. According to sec.56, impossibility of performance may fall into any of the following categories:

1. Impossibility existing at the time of agreement

Section 56, Para 1 Lays down that "an agreement to do an act impossible in itself is void. "This is known as pre-contractual or initial impossibility.

This kind of impossibility may be

(i) Known to the parties

When the impossibility of performance of the obligation is present even at the stage of formation of the agreement and which is known to the parties is called absolute impossibility or initial impossibility known to the parties and the agreement is void ab initio.

Check Your Progress Questions

4. What is meant by Supervening Impossibility ?

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For example : 1. 'A' agrees to pay Rs.1000/- to 'B' if 'B' runs 1000 k.m per hour. Here, the performance of contract (i.e) running 1000 k.m within an hour is an impossible act known to the parties so, the agreement is void.

2. 'A' agrees with 'B' to discover treasure by magic or undertakes to put life into the dead body of his wife, the agreement is void for impossibility.

3. 'A' and 'B' contract to marry each other. Before the time fixed for the marriage, 'B' becomes in sane. The contract becomes void.

(ii) Unknown of the parties

Where at the time of making the contract, both parties are unknown or ignorant of the impossibility of performance of obligation, or destruction of the contract of the subject matter, the agreement becomes void.

For instance : 1. 'A' agrees to sell his horse to 'B' but unknown to both parties, the horse died, before the contract was entered. This contract is void for impossibility of performance.

2. In the case of **Couturier .Vs. Hastie (1856) H.L, 673,** 'A' sold to B certain goods supposed to be on a voyage. The goods had ceased to exist due to the perils of the sea. Held that, the contract was void.

Under **Sec.56 Para 3** if the promisor alone knows the impossibility at the time of formation of the contract, he shall have to compensate the promisee for any loss which such promisee sustains through the non-performance of the promise.

2.Subsequent or supervening impossibility (Sec.56, Para 2)

Sometimes, the performance of the contract may be quite possible when it was entered into. But, some subsequent event may render its performance impossible or unlawful. In such cases, the contract is discharged by impossibility of performance. Impossibility which arises subsequent to the formation of a contract is called post contractual or supervening impossibility. In such a case, the contract becomes void when act becomes impossible or unlawful (Sec.56, Para 2)

Illustration

1. 'A' contracts to take in cargo for 'B' at a foreign port. A's Government afterwards declares war against the country on which the port is situated. The contrast becomes void when war is declared.

2. 'A' contracts to act at a theatre for six months in consideration of a sum paid in advance by 'B'. on several occasions, A is too ill to act. Here the contract to act on those occasions becomes void.

8.4.1. DOCTRINE OF FRUSTRATION

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In England, the doctrine of frustration is the parallel concept of 'Supervening impossibility'. This doctrine has been recognized under the Indian law in Sec.56, Para 2 the contract Act. Frustration means the discharge of a contract rendered impossible of performance by external causes beyond the contemplation of parties.

When the primary and substantial object of the contract with which the parties have entered into cannot perform due to change of circumstance or due to some other event, then the contract is said to be 'frustrated' in English law and said to be 'impossible of performance' in Indian law.

According to Lord Simon Frustration may be defined as "the pre mature determination of an agreement between parties lawfully entered into and in the course of operation at the time of its pre mature determination, owing to the occurrence of an innerving act or change of circumstances; and as entirely beyond what was contemplated by the parties when they entered into the agreement".

Thus, Frustration means that a contract has ceased to bind the parties because the common basis on which mutual undertaking was based has failed.

The doctrine of frustration as embodied in sec.56 of the contract Act may apply, the following three conditions must be satisfied:

(i) The act should have become impossible

(ii) The impossibility should not be self induced by the promisor

(iii) The impossibility should be by reason of some event which could not prevent; and

(iv) The impossibility should not be self –induced by the promisor.

The doctrine of Frustration shall be illustrated by under certain heads cases in which courts have applied it to discharge the parties from absolute liability. Now, let us see some instances in which contract frustrates.

8.4.2. DISCHARGE BY SUPERVENING IMPOSSIBILITY

A contract is discharged by supervening impossibility in the following cases.

(i) Destruction of subject matter of contract

When the subject matter of the contract is destroyed without the fault of the parties the contract is discharged. **In Taylor .Vs. Caldwell (1863) 122 E.R.**

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299, a music hall was agreed to be let out on certain dates. But before those dates, it was destroyed by fire. The contract was held to have became void and the owner of the hall was absolved from liability to let the hall as promised. Thus destruction of the subject matter need not to be total, as long as it is sufficient to prevent a contract from being performed. **V.I. Narasu .Vs. P.S.V. Iyer (I.L.R., 153 Mad, 311)** A contract was entered into between a producer and theatre owner to exhibit a picture at letter's theatre for a particular period and to share the profits. The theatre was demolished subsequently under the orders of the municipal authorities, the shows were stopped. The owner of the theatre had no knowledge of the nature of building. It was held that the continued existence and the demolition discharged the contract.

(ii) Death or incapacity for personal service

Where the promisor dies or is physically unfit to perform a contract and where the contract should be performed by him personally, the contract is discharged by the death or physical disablement of the promisor. Where the performance of contract of a contract for personal services is rendered impossible by the death or physical disability such as illness of the promisor, a term will be readily implied that performance is conditional on the promisor's continued capacity to perform the contract.

In Rabinson .Vs. Davidson (1871 40 L.J Ex. 172) R contracted with D that D should play the piano at a music concert given on a specific day. D was ill on the day in question and unable to perform. The contract was discharged due to illness of D. The death or disablement of party to contract is an act of God or Vis Major over which he has no control.

(iii) Subsequent illegality or change of law

When subsequently to the formation of a contract, change of law takes place, or the Government take some ordinance or special Act, so that the performance of the contract became impossible, the contract is discharged. The law may actually forbid the doing of some act undertaken in the contract or it may take from the control of the promisor in something in respect of which he was contracted to act or not in certain way or performance may become illegal by a change in the operation of law by reason of new facts such as the outbreak of war. In such cases, there is no need to imply a term into the contract as it is discharged ipso facto whether the parties intended or not. But as the consequences are identical with the other instances of impossibility, this category is included under this head. Impossibility by law is valid excuse for non performance.

In Baily V. de.Crespigny (1869) 4 Q,B 180). 'D' while purchasing a plat of land from agreed not to construct buildings on the site. Subsequently, by an Act of Parliament, the site was acquired by a railway company and buildings were raised thereon. In a suit by 'B' against 'D' for breach of the agreement, it was held that 'D' was discharged from liability, since the agreement become impossible by subsequent legislation.

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(iv) Declaration of war

When war is declared, the citizen of one country should not enter into contracts with the citizen of the enemy country. Where a contract has been entered into before the war is declared, then the contract will be suspended during war if the war is for a short period. If the war is for a sufficient long period the contract is discharged on the ground of its impossibility.

Metropolitan Water Board .V. Dick Karr Co ltd (1918) A.C. 119). A contract was entered into in 1914 for the construction of a reservoir in six years. On the account of the great war, the work had to be suspended in 1916. in a suit for damages it was observed that on account of the suspension of performance for some years during the war the contract must have been greatly altered and to compel a party to perform it would be to compel performance of an altogether new contract. It was held that the contract became impossible of performance and the defendant was not liable to pay damages.

Breach due to intervention of war is excusable

In Basanti .Vs. River S.N. Co., (A.I.R. 1987 Cal 271)

In a contract of carriage by river was intercepted by the enemy seizing the vessel along with the cargo during the hostilities between India and Pakistan. The plea of impossibility of performance was accepted.

(v) Non-occurrence or Non-existence of a particular state of things

If a contract entered into on the basis of the continued existence of a certain state of things, and if a state the things changes or ceases to exist, the contract is discharged. **In Krell .Vs. Henry (1903) 2 K.B. 740).** The contract was to hire a flat for viewing the carnation procession of King Edward VII. The procession had to be abandoned on account of the King's illness. A suit was field for the recovery of rent. It was held that the hirer need not pay the rent, as the existence of the procession was the basis of the contract, and its, cancellation discharged the contract.

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8.4.3. IMPOSSIBILITY OF PERFORMANCE - NOT AN EXCUSE

(Exceptions)

In the following cases, a contract is not discharged on the ground of subsequent or supervening Impossibility.

(i) Difficulty of performance

A contact is not discharged by the reason of the fact that the performance has become more difficult, due to some un contemplated events or delays or more expensive.

In the case of **Blackburn Bobbin Co .Vs. Allen & sons (1918)2 K.B. 467,** 'A' sold B a certain quantity of Finland Timber, supplied between July and September. Before any timber was supplied war to be broke out in the month of August and transport was disorganized. 'A' could not bring any timber from Finland. It was held that the difficulty in getting timber from Finland did not discharge 'A' from performance.

(ii) Commercial Impossibility

The Impossibility contemplated in sec.56 is a physical and legal Impossibility and not a commercial Impossibility. A contract is not discharged merely because expectation of higher profits is not realized or the necessary raw material is available at higher price because of the out break of war etc.

In the case of **Karl Ettlinger .Vs. Chagandas & Co (1915),** 'A' promised to send certain goods from Bombay to Antwerp in September. Before the goods were sent, war broke out and there was a sharp increase in the shipping rates. It was held that the contract was not discharged.

(iii) Impossibility due to failure of a third person

The doctrine of supervening impossibility does not cover cases, where the contract could not be performed because of the default of a third person on those work the promisor relied and therefore the contract is not discharged.

In Harandrai Phulchand .Vs. Pragdas, A.I.R. (1923) P.C. 54. A, a wholesaler entered into a contract with 'B' for the sale of a certain type of cloth to be produced by 'C'. a manufacturer of that cloth. 'C' did not manufacture that cloth. It was held that there was no Impossibility of performance and 'A' was liable to 'B' for damages.

(iv) Self-induced Impossibility

When the Impossibility is due to the default of the contracting party himself, Section 56 would not apply. A contract will not be frustrated if it is

caused by the act or omission of one party. For instance, A promisor is not discharged from his liability when his failure to perform the obligation is caused by his arrest and conviction for a crime.

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(v) Failure one of the objects

When a contract is entered into for several objects, the failure of one of the objects does not discha ge the contract.

(vi) Strikes, Lockouts and civil disturbances

These events do not discharge a contract unless the parties have specifically agreed in this regard at the time of formation of the contract.

For example 'X' agreed to supply certain goods to 'Y'. The goods were to be procured from Algeria. Owing to riots and civil disturbances in that country, goods could not be brought. It was held that this was no excuse for the non-performance of the contract. **[Jacob .V. Credit Lyonnais (1814)12, Q.B. 589.]**

Compensation for non-performance

Section 56, Para 3 provides that, where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

For example 'A' contracts to marry 'B', 'A' is already married C. Being forbidden by law to which he is subject to practicse polygamy. A must make compensation to 'B' for the loss caused to her by the non-performance of his promise.

8.4.4. THE EFFECT OF FRUSTRATION

A contract will be discharged by the frustrating event and the contract is treated as void from the time when it is frustrated and the contract is automatically terminated. The leading case on this point is **Fibrusa Spolka .Vs. Fairbairn Lowsou Combe Bariour Ltd (1943 A.C. 32),** An English company agreed in July 1943 to manufacture and deliver certain machinery to a polish company. The agreed Price was £4800 of which £1600 was payable in advance. The appellants had paid £1000. The contract was frustrated on 3rd September when England declare war on Germany. The appellant demanded the money to be paid back to them. The House of Lords held that the money paid was recoverable, after the contract is frustrated. The particular case law decides the question whether money which has already been paid, under a contract is recoverable,

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after the contract is frustrated. The party who is obliged under the rule in Fibrosa's case to make a refund might to have incurred expenses before the contract, was performed. He would not be able to recover compensation for such partial performance of his obligations under the contract. Therefore, the law Reform (Frustrated) Contracts Act of 1943, was passed to remove this hardship. According to this Act. (1) Money paid before the frustrating event shall cease to be payable. (2) Money paid before the frustrating event may be recovered. (3) if one of the parties to the contract has done something by way of partial performance he can recover compensation from the other party to the contract. But it is important to not in order to recover compensation, the other party must received some benefit thereby. It is for the court to fix the amount payable by way of compensation.

In India, Sec.56, Para 2 embodies this doctrine of frustration. In the case of **Satyabrata Ghose .Vs. Mugneeram Bangur AIR (1954) SC,** the supreme court laid down the law relating to frustration in our country and it observed that, "Although various theories have been propounded by the judges and jurists in England regarding the judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions".

In this case, there was a contract for the sale of land, by a company which undertook to construct drains and roads on the land under a scheme called "Lake colony scheme" for converting the land into a residential area Part of the land was acquired by the government for military purpose and thereby the construction of drains and roads was interrupted. The question was whether the agreement was discharged by frustration. It was held that the interruption was not such as to destroy the contract and so the parties were not discharged from complying with their obligations under the contract.

8.5. DISCHARGE BY LAPSE OF TIME

A contract is discharged by lapse of time. The limitation Act, 1963 lays down that a contract should be performed within a specified period. If it is not performed and if no action is taken by the promisee within the period of limitation, he is deprived of his remedy by law and the contract is discharged in such a case. For instance; the period of limitation to file a money suit is three years. If within three years, the creditors fails to file a suit to recover his amount, the debt becomes time barred and the debtor is discharged from his liability to repay the amount.

8.6. DISCHARGE BY OPERATION OF LAW

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The lost mode in which a contract is discharged is by operation of law. A contract may be discharged independently of the wishes of the parties (i.e) by operation of law. In the following circumstances, a contract may be discharged by operation of law.

(a) Merger

Merger takes place when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party under the same or some other contract. According to '**Anson**' "if the higher security is accepted in the place of a lower, the security which in the eye of law is inferior in operative power in the absence of a contrary intention manifested by the parties, merges in the higher". When a superior right and an inferior right coincide and meet in one and the same person, the inferior right merges into the superior right.

Examples

(i) 'A' holds certain property under a lease. Subsequently, he buys that property. His rights as a lessee in merged into his right of ownership now acquired.

(ii) If 'X' and 'Y' enter into an oral agreement and afterwards make an identical contract in writing, the oral contract is merged in the subsequent agreement.

(iii) A bill of exchange is discharged if the accepter becomes the holder of it.

(b) Insolvency

When a person is adjudged as insolvent, he is discharged from all liabilities incurred prior to his adjudication. Upon insolvency, the rights and liabilities of the insolvent are transferred to the official assignee or official receiver. As a rule, a contract is not discharged by the insolvency of the parties. But, when the insolvent has obtained from the court an order of discharge, it effects a statutory release of the insolvent from his debts and liabilities provable under the insolvency.

(c) Alteration

An alteration of a written contract made without the consent of the other party has the effect of discharging the contract. In such cases, alteration must be made in a material part of the contract.

Anson defines, "If a deed or contract in writing is altered by addition or erasure, it is discharged except as against a party making or assenting to the

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alteration. If the alteration is made with the assent of both parties, it operates as a new agreement.

(d) Death

Where performance of a contract involves personal skill or ability, the contract is discharged on the death of the promisor. In other contracts, the rights and liabilities of the deceased promisor pass on to his legal representatives.

8.7. DISCHARGE BY BREACH OF CONTRACT

Breach of contract a breaking of the obligation which a contract imposes. Parties to a contract has to perform their respective obligations under the contract. If any party fails to perform his obligation, it takes place a breach of contract. It occurs when a party to the contract without lawful excuse does not fulfill his contractual obligation or by his own act makes it impossible that he should perform his obligation under it. It confers a right of action for damages on the injured party Breach of contract operates as a discharge of the contract. Breach of contract may be

1. Actual breach of contract; or
2. Anticipatory breach

8.7.1. ACTUAL BREACH OF CONTRACT

When a person does not perform his part of the contract at the time when it is due, he will be liable for its breach. Actual breach may take place in the following ways.

(a) When performance is actually due

(b) When actually performing the contract.

(a) When performance is actually due

Actual breach of contracts occurs, when at the time, when the performance is due, one party fails or refuses to perform his obligation under the contract.

For example: 'A' agrees to deliver to 'B' 2 tons of sugar on 1st April. But, he does not deliver the sugar on that day. There is a breach of contract by 'A'.

(b) Breach in the course of performance of contract

Actual breach of contract also occurs when during the performance of the contract, one party fails or refuses to perform his obligation under the contract.

In cort .Vs. Amber Gate Railway company (1872), the plaintiff agreed to supply to a railway company with 3000 tons of railway chairs at a certain price to be delivered in installments. After 1,787 tons had been delivered to the

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company, the railway company told the plaintiff to deliver no more chairs. It was held that this is a breach of contract by company and the plaintiff could breach an action for breach of contract.

8.7.2. ANTICIPATORY BREACH OF CONTRACT (Sec.39)

If a party to a contract repudiates the contract at any time before the time of performance, it is called an 'anticipating breach'. A breach of contract may take place before the time actually fixed for the performance. In certain cases, acts done by a party before performance has become due are treated by law as amounting to a constructive breach by way of anticipation. It is known as anticipatory breach. It may arise (i) by an impossibility of performance created by a party or (ii) by a repudiation of contract by one party.

Anticipatory breach is otherwise known as **'Constructive breach'**.

For example 'A' agreed to purchase a land belonging to 'B' for Rs. Lakh. They agreed to perform the contract on 9.5.2009 but, on 9.3.09, 'A' wrote a letter to 'B' stating that he does not have sufficient money and so he is not willing to purchase the land. Here, the act of 'A' amounts to anticipating breach.

The parties to a contract which is wholly executory have a right to do something more than the performance when the time arrives. The renunciation of a contract by one of the parties before performance is due, does not ipso facto put an end to the contract but it discharges the other, if he so chooses and entitles him to sue for the breach at once without waiting for the time at which performance is due. The principle is well established in sec.39 of the contract Act, which reads as follows:

"When a party to a contract has refused to perform or disabled himself from performing his promise in its entirely, the promisee may put end to the contract, unless he has signified by words or conduct his acquiescence in its continuance".

In the case of **Hochester .Vs. De la Tour (1853),** 'D' engaged 'H' on 12th April to enter into his service as courier and to accompany him upon a tour. The employment was to commence on 1st June. On 11th May 'D' wrote to 'H' telling him that his services would no longer be required. 'H' immediately brought an action for damages although the time for performance had not yet arrived. It was held that he was entitled to sue for damages without waiting till June 1.

In **Lovelock .Vs. Franklyn (1846) 8, Q.B. 371,** 'A' promised to assign to 'B' within seven years from the date of his promise, all his interest in a lease for the sum of £.140. Before the end of the seven years, he assigned his interest

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to another person. It was held that this was anticipatory breach of contract by implied repudiation.

Consequence of anticipatory breach

Section 39 provides that where a party to a contract refuses to perform his part of contract, before due date of performance, the promisee has the option, either

(i) to treat the whole contract as discharged and to claim damaged against the other party, for breach of contract, although the time for the performance of contract has not yet arrived, or

(ii) to treat the contract as still operative and wait for the time of the performance and then hold the other party responsible for all the consequence of non-performance.

Moreover, when anticipatory breach is committed by one party, the other party is excused from performing his part of the obligation under the contract.

Measure of damages in anticipatory breach

The amount of damages are measured in anticipatory breach as follows :

(i) If repudiation of contract is accepted and the contract is put to an end immediately, the damage will be measured by difference of price prevailing on the date of breach and the contract price.

(ii) If the contract is kept operative and subsisting then the damages will be measured by difference between the contract price and the price prevailing on the date fixed for performance.

8.8. REMEDIES FOR BREACH OF CONTRACT

The remedies available to a party in case of breach of contract are of two kinds. 1. Equitable remedy and 2. Common law remedy. An aggrieved party is entitled to damages under common law remedy. But equitable remedy consists of (1) Specific performance of contract, (2) Injunction, (3) Rescission and (4) Cancellation. The Indian Contract Act deals with damages and the other reliefs are dealt with by Specific Relief Act.

8.8.1. DAMAGES FOR BREACH OF CONTRACT:

Damages are a monetary compensation allowed to the injured party by the court for the loss or injury suffered by him by the beach of contract. When one of the parties to the contract has not performed his part of the contract then

the other aggrieved party is entitled to damages as a relief under the Contract Act. The fundamental principle underlying the theory of damages is to award compensation to the aggrieved party. The object of awarding damages is to put the aggrieved party in the position in which he Would have been if the contract had been performed. The measure of damages is the value of performance of the contract to the plaintiff and not what it costs the defendant to perform it.

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The foundation of modern law of damages, both in India and England, is to be found in the judgement. In the case of **Hadley .Vs. Baxendale, (1854) 9 Ex. 341**, where **X's mill** was stopped by the breakdown of a shaft. He delivered the shaft to Y, a common carrier to be taken to a manufacturer to copy it and make a new one. X did not make known to 'Y' that delay would result in loss of profits. By some neglect on the part of 'Y' the delivery of the shaft was delayed in transit beyond a reasonable time (so that the mill was idle for a longer period than otherwise would have been the case had there been no breach of the contract of carriage). Held, Y was not liable for loss of profits during the period of delay as the circumstances communicated to Y did not show that a delay in the delivery of the shaft would make loss of profits to the mill.

Alderson. B observed in this case as follows;

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally. i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both the parties at the time they made the contract as the probable result of the breach of it.' This statement of law is generally known as the Rule in **Hadley Vs. Baxendale.**

Sec.73 of the Contract Act which deals with "compensation for loss or damage caused by breach of contract" is based on the judgment in the above case. The Rule as given in Sec. 73 are as follows :

When a contract has been broken, the injured party is entitled to

(a) such damages which naturally arose in the usual course of things from such breach. This relates to ordinary damages arising in the usual Course of things :

(b) such damages which one parties knew, when they made the contract, to be likely to result from the breach. This relates to special damages. But—

(c) Such compensation is not to be given for any remote or indirect loss or damage sustained by the reason of the breach and

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(d) Such compensation for damages arising from breach of a quasi contract shall be same as in any other contract.

In estimating the loss or damage arising from of a breach of contract, the means hich existed remedying the inconvenience by the non-performance of the contract must be taken into account.

8.8.2. KINDS OF DAMAGES

Damages have been divided into four kinds: 1. General or Ordinary damages. 2. Special damages. 3. Vindictive or exemplary damages 4. Nominal damages.

1. General or Ordinary damages :

General or ordinary damages are payable to the injured partly for any loss which arises naturally in the usual course of things from the breach of contract. Ordinary damages are awarded only for consequences naturally following out of the breach and are restricted to the proximate consequences. Remote consequences will not be taken into consideration for awarding ordinary damages. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of contract. In the case of contract of sale and purchase, the damages payable will be the difference between the contract price and market price on the date of breach.

Illustration :

A agrees to supply 10 bags of rice to 'B' on a particular date. The price as agreed between the parties is Rs. 100 per bag. Therefore the contract price comes to Rs. 1000. Suppose A failed to deliver 10 bags of rice as agreed on the particular date. B is entitled to damages for breach of contract. The market price on the particular date is Rs.150 per bag. The damages payable in the contract of sale will be the difference between the contract price and market price on the date of breach. Therefore B will get Rs. 500, by way of damages (Market price for 10 bags is Rs. 1,000)

C.T, Xavier .Vs. P.V. Joseph, AIR 1995 Ker. 149: The plaintiff entered into a contract with the defendants entered into a contract with the defendants to construct 5 godowns at a cost of Rs. 9, 29,379/-. After execution of part of the work, the defendant committed breach of contract and consequently the remaining work was abandoned. After deducting the amount covered by the bills, the plaintiff who suffered loss claimed 10% of Rs. 7,92,633/- to regard to the work abandoned for loss of profits. Held that, this claim is more than reasonable because any contractor expecting 10% profit and claiming damages in regard thereto on the basis of loss should be considered reasonable and justifiable.

In **Snutg .Vs. Green (1876 I.C.P. d. 92)** A cow was sold with a warranty that it was free from disease, and damages were claimed on the ground that the cow was suffering at the time of sale from feet and mouth disease with the result that not only that cow died but infected the other cows of the plaintiff also. It was held that damages could be claimed for the entire loss. Damages for personal inconvenience can be granted. In a contract of payment of money, the measure of damages in case of default will be reasonable interest. The party entitled to damages is required by law to mitigate the damages.

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2. Special damages:

Special damages result from the breach of contract under special circumstances. But special damages are not recoverable unless special circumstances are brought- to the notice of the other party before the contract is made. If at the time of entering into a contract, a person has notice of special circumstances, then he is liable to pay special damages in the case of breach of contract.

In the case of **Simpson .Vs. London and North western Railway Company (1876) I.O.B.O. 274),** the plaintiff, a dealer in cattle foods,. sent sample, by train for being exhibited at a particular agricultural show, which fact was made known to the Railway Company. The goods reached the destination after the show was over. It was held that the special circumstances having been brought to the notice of the Railway Company, it must be deemed that the special damages, namely loss of profits, were in the contemplation of the parties at· the time of entering into the contract to be the natural consequences of the breach and that they were recoverable.

In **Hadley .Vs. Baxendale (1854 (Ex.341),** the plaintiff, an owner of a mill at Gloucester, entrusted a part of the machinery to the defendant, but he was not made aware that for want of the part, the whole mill would remain idle. There being extraordinary delay in delivering the machinery, plaintiff filed a suit not only for the delay in delivering the machinery, but also for the loss of profits during the time the mill had remained idle due to the defendant's delay in forwarding the machinery. It was held that damages on the first count could be awarded but not those for loss of profits which constitute special damages, because the plaintiff, did not make known to the 'defendant that the profits would be lost by late delivery and the probability of its occurrence was not in the contemplation of the parties at the time of entering into the contract.

Check Your Progress Questions

5. Define Exemplary Damages.
7. Explain the rule Hadley .Vs. Baxendale.

3. Vindictive or Exemplary damages:

They are quite heavy and are awarded not solely with the idea of awarding damages but with a view to punish the defendant. They are awarded only in

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cases of (a) breach of promise to marry. (b) breach of a contract by a barker possessing the funds of the customer to honour his cheque. In a breach of promise to marry damages will be awarded by taking into consideration the extent to injury to the feelings of the parties. In the case of breach of contract by a banker as stated above, the rule is "the smaller the cheque, the greater the damage".

4. Nominal damage :

These damages are quite small in amount and awarded when there is a breach of contract, but where there is no loss to the plaintiff. These damages are awarded only with a view to establish the right of the plaintiff and the nominal damages consist of a sum of money which is very small in quantity, e.g., a rupee, a shilling. **In Chapter .Vs. Sullivan (1967) Q.B. 117):** Where a buyer contracted to purchase cars and committed a breach, but the demand for cars far exceeded the supply, and the car dealer could sell the cars agreed to be purchased only to nominal damages.

Section 73 of the Indian Contract Act deals with damages for breach of contract. Section 73, When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the *contract,* compensation for any loss or damages caused to him thereby which naturally arose in the usual course of things from such breach or which the parties know when they made the contract to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damages sustained by the reason of the breach.

When an obligation resembling those created by contract has been created and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person has contracted to discharge it and broken his contract.

Explanation: In estimating the loss or damages arising from a breach of contract the means which existed of remedying the inconvenience caused by the non performance of the contract must be taken into account.

Illustration: (a) A contracts to sell and deliver 50 mounds of saltpeter to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of_compensation, the sum, if any, by which contract price falls short of the price, for which B might have obtained, 50 mounds of saltpeter of like quality as the time when the saltpeter ought td have been delivered (b) A hires B's ship to go to Bombay and there take on board the first January a cargo which A is to provide and to bring it to Calcutta the freight to be paid when earned. B's ship does not go to Bombay but, A had opportunities of procuring

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suitable convenience for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself _of those opportunities but is put to trouble and expense in doing so'. A is entitled to receive compensation from B in respect of such trouble and expenses.

The rule relating to awarding of damages are as follows:

1. Where a party sustains a loss , by reason of a breach of contract' he is to be placed in the same financial position as if the contract had been performed.

2. The injured party is entitled to recover only actual loss suffered by him by way of compensation, On this account only damages which may fairly and reasonably be considered as fair and naturally arising from the breach of contract can be recovered.

3. Special damages are recoverable only If the special circumstances are communicated to the other party to the contract.

4. Damages for remote consequences are not usually allowed.

5. The injured party is not disentitled to damages because it is difficult to assess them.

6. It is the duty of the injured party to minimize the damages.

7. If the parties agreed about the damages for breach of contract only the agreed amount can be recovered.

8. Vindictive damages cannot be awarded for breach of contract, except for breach of promise to marry or against a banker for wrongfully dishonoring the cheque when there is sufficient funds.

Victoria Laundry (Windsor) Ltd. .Vs. Newman Industries Ltd. 1949 .I.A. E.R. 997 (C.A): The plaintiff filed the suit for damages for loss of profit which the plaintiff could have made 'by using the boiler. It was held that as the defendants had means of knowledge that some loss was likely to result by the delay in delivering the boiler, the defendants were liable for such loss.

But this view of foresee ability held in the Victoria Laundry case was not accepted in the **Heron II case (1969 l.A.C. 360)**. In this case a ship was chartered to carry a cargo of sugar from Constanza to Basrah. At the time of contracting, the charterer Intended to sell the sugar as soon as it reached Basrah. In fact, the ship owner did flat actually know this aspect. However he was aware that there was a market for sugar at Basrah, and if he had thought about the matter, he must have realized that at least it was not unlikely that the sugar would be sold in the

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market at the market price on arrival. The ship owner, in breach of contract deviated and reached Basrah nine days later. In the mean time, the market price of sugar at Basrah fell. Under these circumstances, the House of Lords held that the charterer was entitled to damages for the loss suffered by the fall in the market.

Penalty and Liquidated damages:

If the parties fix at the time of entering into contract, the amount payable by way of damages for breach of contract then it is the duty of the court to see whether the amount fixed by the parties can be awarded as damages. If this is done, the stipulated damage would be known as liquidated damages. The distinction between penalty and liquidated damages is very important. A penalty is a sum named in the contract at the time of its formation, which is disproportionate to the damage likely to accrue as a result of the breach. It is fixed up with a view to secruing the performance of the contract. In other words, 'penalty' means an amount fixed in terrorem without any regard to the probable loss. The liquidated damages is a fair and genuine pre-estimate of damages. Ordinarily damages in the nature of liquidated damages are permissible and the party is entitled to recover such amount by way of damages. But the amount fixed is without any regard to probable loss, due in terrorem as it were to prevent a party from committing breach of contract, it is penalty and will not be allowed. In England, only damages in the nature of liquidated damages is allowed and if the amount fixed is in the nature of penalty 'the court will dis-allow the claim. But the Indian law is different. According to section 74 of the Indian Contract Act, there is no such difference between liquidated damages and penalty and the Indian contract Act provides payment of only reasonable compensation.

Example: A contracts with 'B' to pay 'B' Rs. 2,000/- if he fails to pay B Rs. 1,000/- on a given day. A fails to pay 'B' Rs. 1,000 on that day B is entitled to recover from A such- compensation not exceeding Rs.2000/-at the court considers reasonable. Where a contract provides for payment in a number of installments but on the failure to pay any installment the whole amount is to be paid forthwith, such a stipulation is not penalty and the contract can be enforced according to its terms.

Payment of interest

If a contract provides that the amount should be paid on a particular date and in default, it will be payable with interest, then the court will give effect to such an agreement if the interest is reasonable. If the rate of interest is unreasonable and exorbitant, the court may grant relief by granting a reasonable amount by way of interest.

Check Your Progress Questions

6. What is meant by Liquidated Damages.

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Forfeiture of earnest money

Earnest money represents a guarantee that the contract shall be fulfilled. to say that the "earnest" is given to bind the contract. Earnest money is part of purchase price and is liable to be for feited when the mansaction fall through an account of default or failure of the purchaser in the absence of anything contrary in the terms of contract. Where the plaintiff paid an earnest money of Rs.2000/- towards allotment, cancellation of allotment and forfeiture of earnest money by the defendant on account of failure of the plaintiff to pay the subsequent instalments was held to be proper. **[Lal chand .Vs. Chandigarh Administration AIR 1992 P&H 194 : 1992 PLJ 58.]**

Equitable Remediles : Rescissions

When a contract is broken by one party, other party may sue to treat the contract as rescinded and refused further performance, in such a case, he is freed from all his obligations under the contract.

Illustration:

A contracts with B to repair B's house, B neglects or refuses to point out to A the places, in which his house requires repair. A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

Specific Performance :

Where damages are not adequate remedy in cases of breach of contract, the court may direct the party to carry out the promise according to the terms of contract. This is known as specific performance of contract.

Injunction :

Under certain circumstances, the court may issue an order upon a party prohibiting him from doing something which amounts to a breach of contract. Such an order of injunction by the court is discretionary. **Warner Bros. Vs. Belson (1937) I.K.B. 209)** : N, a film actress agreed to act exclusively for W for a year and for no one else. During the year she contracted to act for Z. It was held that she could be restrained by on order of injunction from doing so.

Rectification or cancellation :

When through fraud or a mutual mistake of the parties, the contract does not express the real intention of the parties, either party to the contract may institute a suit to have the contract rectified. The court may rectify the contract under the above said circumstances so as to express the intention of the parties. If rectification is not possible, then the court will order for the cancellation of the .contract. The Equitable remedies are elaborately discussed in the later lesson under the Specific Relief Act.

Check Your Progress Questions

8. Define 'Quantum meruit'

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Quantum Merit

The phrase Quantum meruit means 'as much as earned'. A claim for quantum meruit arises in the cases where a contract has, partly performed by one party and the other party has terminated the contract by breach or the work cannot be performed further due to subsequent impossibility or illegality. In such cases, the party who has partly performed the contract can claim reasonable remuneration for the work done Right to claim 'Quantum meruit' is founded not on the original which is discharged or is void but an implied promise by the other party to pay for what has been done, the amount of quantum – meruit will be assessed, independent of the contractual terms. Even if, the contract is silent regarding the right to claim quantum meruit, parties can claim it. Quantum Meruit is one of the important instances of Quasi-contract. **In Planche .Vs. Colburn,** where 'C' appointed 'p' to write a book to be published by instalments. After a few issues of the magazines had come, it was abandoned. Held that 'P' can recover the amount for the work he had done under the contract on quantum meruit. (This concept of Quantum meruit is discussed in detail in the next chapter. (Ref. unit.9)

8.9. SUMMARY

We hope that from this chapter, you can understand the meaning and various modes for discharge of contract. A contract is said to be discharged when the obligations arising from the contract comes to an end. The important methods of discharge of contract like, performance of contract, subsequent agreement, impossibility, and operation of law are elaborately discussed with number of case laws and illustrations, the doctrine of Frustration is clearly explained in this unit. Moreover, this chapter clearly enunciates the important concept of breach of contract and its remedies with many examples and case laws.

8.10. KEY WORDS

1.	Frustration	-	The unforeseen determination or prevention of a contract by reason of the destruction of the subject matter
2.	Supervene	-	Subsequent
3.	Gratuitous	-	being grateful
4.	Wavier	-	an intentional forgoing of one's right
5.	Lessee	-	A person to whom a lease is made
6.	Repudiate	-	to disown; Refuse to acknowledge or accept
7.	Mode	-	Method; Manner of doing
8.	Deprive	-	to strip a person of what he possesses
9.	Voyage	-	to make a travel by sea to distant places

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10. Contemplate - to observe with; to intend or think deeply; continued attention
11. Ipso facto - By the very act.

8.11. ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	-	Refer Section **8.1**
	Question No.2	-	Refer Section **8.3.1**
	Question No.3	-	Refer Section **8.3.4**
	Question No.4	-	Refer Section **8.4**
	Question No.5	-	Refer Section **8.8**
	Question No.6	-	Refer Section **8.8**
	Question No.7	-	Refer Section **8.8**
	Question No.8	-	Refer Section **8.8**

8.12. EXERCISE QUESTIONS

A. Short answer Questions

1. Explain discharge by performance of contract.
2. When does a claim on quantum meruit will arise?
3. Explain the rule in Pinnel's case?
4. Explain how a contract is discharged by agreement or consent of parties.
5. Write short notes on
   a. Accord and satisfaction
   b. Novation
   c. Hadley .Vs. Baxendale
   d. Anticipatory Breach
   e. Hochster .Vs. De La Tour.
6. Explain 'Discharge by operation of law'
7. Explain Liquidated damages and penalty.

B. Long answer questions:

1. What are the various modes / ways in which a contract may be discharged?
2. "The doctrine of frustration has often been said to depend on adding a term to the contract by implication" comment.
3. State and explain the circumstances in which a contract is discharged by impossibility of performance.
4. Discuss the effects of supervening impossibility on the performance of a contract?
5. What are the remedies available to an aggrieved party on the breach of a contract? (or) state the principles relating to the award of damages for breach of contract.
6. What do you understand by 'anticipatory breach of contract? State the rights of the promisee in case of such breach ?

UNIT - 9
QUASI - CONTRACTS

INTRODUCTION

A contract to be enforceable must have certain essential elements like offer, acceptance, consideration, free consent and lawful object etc, and it comes into existence from the action of the parties. But under certain circumstances, the law creates and enforces legal rights and obligations, even when no contract exists. Such legal obligations imposed by law are known as 'quasi - contract,' under English law. Infact, Quasi-contract is not at all a contract but it merely resembles a contract and produces similar effect. It is based on the principle of 'Justice, equity and good conscience'. The Indian contract Act dealswith the concept of quasi-contract in a different name as "certain relations resembling those of contracts".

UNIT OBJECTIVES

- ❖ To understand the meaning and nature of Quasi- contract.
- ❖ To learn about the theories of Quasi- contract.
- ❖ To study the various kinds of Quasi- contract.
- ❖ To understand the meaning of the term "Quantum Meruit".
- ❖ To know about the differenence between Indian law and English law

UNIT STRUCTURE

9.1 Meaning and Nature
9.2 Basic Theories of Quasi -contract.
9.3 Various Instances of Quasi contract.
9.4. Quasi - contracts in English Law
9.5. Quantum Meruit
9.6 Summary
9.7 Keywords
9.8 Answers to check your progress
9.9 Exercise Questions

9.1 MEANING AND NATURE

The Latin term 'Quasi' means 'similarly' or 'as if.' Strictly speaking, Quasi- contract is not at all a real contract. A contract is intentionally entered into by parties. But a quasi - contract is created by law not created by parties. Mutual consent of parties is not required in such a contract. These transactions

are fictiously deemed as contract in order to get contractual remedies. In a quasi-contract, there is no actual contract arising from the meeting of minds of two parties, but the law attributes to a particular situation consequences which are similar to those of a contract.

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Sometimes a person may receive a benefit to which the law regards another person as better entitled. The law requires that the first person should transfer the benefits to such better entitled person, even in the absence of any contract between the parties. Such relationships are termed as 'Quasi-contracts'. It is created on 'equitable considerations'. In English law, such contracts are also called "Implied contracts' or **'constructive contracts'**. In Roman law, they are called as **'obligatio quasi ex contractu'**. The American Restatement refers them as "**law of restitution**". The Indian contract Act. recognises such types of contract .Sections 68 to 72 dealwith such contracts under the heading of 'certain relations resembling those created by contracts'.

9.1.1. DEFINITION

Dr. Winfield defines quasi - contract as, "liability not exclusiverly referable to any other head of law imposed upon a particular person to pay money to another particular person on the ground of unjust benefit".

According to **Lord Wright,** it is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or in tort and are now recognized to fall within a third category of a common law which has been called quasi-contract or restitution".

In an American case, **Miller Vs.Schloss** it was observed that, "In truth, quasi -contract is not a contract at all. It is an obligation which the law creates in the absence of any agreement, when the acts of the parties or others have placed in the possession of one person, money or it's equivalent, under such circumstances that in equity and good conscience he ought not retain it, and which 'ex aequo et bono' (in justice and fairness) belongs to another".

9.2 BASIC THEORIES OF QUASI-CONTRACT

The law is not well settled regarding the basis on which the quasi - contractual obligation is given validity. there are two popular theories relating to the basis of quasi-contract.

Check Your Progress Questions

1. What is quasi contract?

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(i) Theory of Unjust Enrichment :

The basis of quasi contract is to prevent unjust enrichment or unjust benefit. It, means that, no one shall be allowed to enrich himself unjustly at the expenses of another.

Lord Mansfield, who is considered as the founder of quasi-contractual obligations explained that, law as well as justice should try to prevent 'Unjust enrichment', that is, enrichment of one person at the cost of another. He explained this theory in the case of **Moses Vs.Macferlan (1760)**. In this case Moses obtained four promissory Notes from Jacob and he endorsed them to Macferlan and by a written agreement he excluded his personal liability on the endorsement. However, Macferlan recovered the amount from Moses by filing a suit on the endorsement. Moses was thus compelled to discharge a liability which he had excluded and therefore Moses sued against Macferlan in the kings Bench to recover back his money from Macferlan. Lord Mansfield allowed him to recover the amount, on the basis of 'Unrich enrichment'.

The principle of unjust enrichment requires that

[i] The defendant has been 'enriched' by receipt of a benefit.

[ii] This enrichment is at the expenses of the plaintiff and

[iii] The retention of the enrichment must be unjust (Mahabir Kishore Vs.state of Madhya Pradesh.AIR (1990) S.C.313)

(ii) Theory of Implied Promise

It means that eventhough there is no express contract between the parties the transaction can be treated as implied promise [or] Implied contract. It is also called as notional promise.

The House of Lords established this theory of "Implied promise" as the basis of quasi- contract in the case of **Sinclair Vs.Brougham (1914 A.C. 398)**. In this case, a building society was engaged in banking business which was outside its objects and legal powers. It had accepted large sum of money from depositors on contracts of borrowing which were ultravires and void. The society was being wound up. After the outside creditors had been paid, the remaining assets were insufficient to pay both share holders and the depositors in full. The question arose whether the bank creditors were entitled to recover the amount.

The House of Lords allowed the distribution of the mixed fund among the claimants, but it didnot allow any remedy under quasi-contract. It was held that quasi- contract cannot be invoked when it is not possible to imply a condition that money was to be repaid. such a condition could not be implied in this case because the contract was ultravires of the company.

9.3. VARIOUS INSTANCES OF QUASI-CONTRACT

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Sections 68 to 72 of Indian contract Act, provide various kinds of quasi contractual obligation under the heading of "Certain relations resembling those created by contract".

The common instances of quasi-contract are dealt with in Sections. 68 to 72.They are detailed below.

(1) Claims for necessaries supplied to a person who is incapable of entering into a contract. (Section 68)

(2) Reimbursement of which he is interested. (Section 69).

(3) Obligation of a person enjoying benefit of a non-gratutious act-Quantum Meruit. (Section 70)

(4) Rights and liabilities of finder of lost goods.(Section 71)

(5) Liability of person to whom money is paid or things delivered by mistake or under coercion (Section 72).

9.3.1. SUPPLY OF NECESSARIES:

Section 68. Claim for necessaries supplied to person incapable of contracting or on his own account :

Generally a contract with a minor, lunatic or idiot is void. But section 68 is an exception to the above rule. It provides that if a contract is with a minor, lunatic or idiot for the supply of necessaries to them or to their dependants, their property is liable for the things so obtained.

According to section 68, If a person incapable of entering into a contract or any person to whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. Thus, the liability is not personal but is imposed on the estate. In India such an incapable person will not incur any personal liability i.e. nothing can be realized from him if he has no property of his own.

In England, he can be personally held liable for a reasonable price of the necessary goods supplied to him according to his position in life.

Illustration (a) A supplies B, a lunatic, with necessaries from B's property (b) A Supplies to the wife and children of B, a lunatic, with necessaries, suitable to their condition in life. A is entitled to be reimbursed from B's property.

(Space for Hints)

9.3.2. PAYMENT BY INTERESTED PERSON :-

Section 69 : Reimbursement of person paying money due to another in payment of which he is interested :

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the others. **Illstration :**'B' holds a land in Bengal on lease granted by 'A', the Zamindar. The revenue payable by A to the Government being in arrears, his land is advertised for sale by the Government. under the revenue law, the consequence of such sale will be the annulment of B's lease. 'B', in orter to prevent the sale and the consequent annulment of his own lease pays to the Government the said revenue arrears due from A. It was held that 'A' is bound to pay the amount so paid to 'B'.

For the application of section 69 the following conditions must be proved :

1. The person making the payment is interested in the payment of money. The payment made should be bone fide for the protection of one's own interest.

2. The payment should not be a voluntary payment. There must be legal or coercive process compelling the payment.

3. The payment must be one which the other party bound by law to pay.

4. The payment must be to another person.

Cases under this head usually arise where the properties of a person get into the hands of third parties. It must be noted that to recover the amount the plaintiff must have been compelled by law to pay or the plaintiff has interest in the payment.

For instance, 'A' purchased a property from 'B' bonafidely. He can recover from B, the money paid to save the property from being sold in execution of a decree obtained against 'B'.

A, a tenant under B paid the taxes which his landlord B is liable to pay in order to prevent the land in his possession from being proceeded against in execution. Here there is an obligation on B, the party benefited, to repay the amount paid for his benefit to 'A'.

G.G.Seksaria V.State of Gondal (63. L.W. 434 (P.C)

Where a company which had contracted to buy certain mills in respect of which some taxes were due, to municipality and when the mills were put up for sale for the realization of those taxes, the company paid the same.

It was held that the payment by the company was a voluntary payment made by one interested in the payment of taxes within the meaning of section 69 of the contract Act and that the company was entitled to be reimbursed by the owners of the mills who were bound to pay the taxes.

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9.3.3. OBLIGATION TO PAY FOR NON-GRATUITOUS ACTS (Section 70)

Quantum Meruit:

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit, the latter is bount to make compensation to the former in respect of or to restore, the thing so done or delivered. (Section 70).

Non- gratuitous act means an act or service done with the expectation of something in return (i.e) something just equivalent of the service rendered. The person who has enjoyed such non-gratuitous act is liable to compensate the person who has done such act or service to him, eventhough there was no contract between them to this effect.

Illustration:

a) 'A', a tradesman left his goods at B's house by mistake. 'B' treats the goods as his own. He is bound to pay 'A' for them

b) A save B's property from fire. 'A' is not entitled to compensation from 'B', if the circumstance show that he intended to act gratuitously.

According to section 70, if a party to a contract has rendered service to the other not intending to do so gratuitously and the other person has obtained benefit, the former in entitled to compensation for the value of the service rendered by him.

In order to apply section 70 of the contract Act, the following conditions must be fulfilled:

(i) A person must have lawfully done something for another person

(ii) The act or service done or the thing delivered must be lawful

(iii) It must be a non-gratuitous Act

(iv) That the other parts must have joyed some benefit there of

If these cnditions are satisfied, the person enjoying the benefit of the act is put under an oblication to make compensation to the person doing the act or to restore the thing so done or delivered.

Check Your Progress Questions

2.. What is meant by Non-gratuitous act?

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In the following circumstances there is no liability

(i) If the act done or the thing delivered is part of unlawful at.

(ii) If the circumstances of the transaction shows that it is done gratuitously.

(iii) If it is done to a erson who is legally incompenant to enter into a contract.

In **Damodar Mudaliar Vs. Secretary of State of India. (1894) 18, Mad 88)** A village was irrigated by a tank. The Government effected certain repairs to the tank for its preservation and had no intention to do so gratuitously for the Zamindars. The Zamindars enjoyed the benefit thereof. It was held that they were liable to contribute.

In **Pannalal Vs Deputy Commissioner, Bhandara (A.I.R. 1973, S.C 1174)**, contracts were entered into for effecting certain additions and alterations to three hospitals. The agreements were entered into with the Deputy Commissioner, who was principal district officer who was not authorised to enter into conracts by the Government. The terms were those of the standard P.W.D. form and the rates also according to the P.W.d. rates as and when revised. The deputy Commissioner duty Sanctioned the revisied rates as well.

The contractor was held entitled to recover payment at the enhanced rates under section 70 of the contract Act from the Municipal Committee which owned one of the three Hospitals and the Maharashtra Government which owned the other two.

In **Abraham Vs. K.A.Cheriyan, AIR (1986) (ker.60),** it was observed that Section 70 is not based on contract but embodies the equitable principles of restitution and prevention of unjust enrichment.

Section 70 of the contract Act corresponds to actions for quantum meruit, under English law which means as much as earned. (The concept of 'Quantum meruit is seperately discussed in unit.9.5) A Quantum Meruit claim arises when a person has partly performed his obligation and is prevented from competing it on account of the default of the other, he is entitled to receive a reasonable remuneration.

Compensation on quantum meruit is awarded for work done or services rendered when the price there of is not fixed by a contract for work done or services rendered pursuant to the terms of a contract. (The concept of 'Quantum meruit is seperately discussed in unit.9.5)

9.3.4. RESPONSIBILITY OF FINDER OF LOST GOODS: (Section 71)

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According to Section. 71 'A person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailee..'

When a person finds a lost goods belonging to another and takes it into his custody, his conduct creates a quasi - contractual obligation between himself and the true owner under such circumstances, the rights and liabilities of the finder of lost goods is same as that of a bailee in a bailment contract under sec.168 of the contract Act. The finder of lost goods is bound to take as much care of the goods found as a man of ordinary prudence would take of his own goods. He must also take all necessary steps to trace out the real owner,. He cannot appropriate the goods with out taking proper steps to find out the owner and he should keep them for a reasonable time.

Section 403 [Explanation 2] of the Indian penal code explains the criminal liability of such person [Finder of goods]. This section provides that he would be guilty of misappropriation of property if he appropriates it to his own use.

Now, Let us see some English case laws regarding the responsiblity of finder of goods. According to english law, a person who has taken possession of lost goods from a public or quasi public place will be entitled to keep it as ag inst the whole world except the true owner. But, the goods found on private roperty belong to the owner of such property.

In **South staffordshire water co Vs. Sharman,** it was held that the owner of a pond was held to have the right to keep the gold rings found at the bottom of the pond.

But this principle was not applied to a bundle of currenty notes found in a shop and picked up by a customer. In **Bridges vs Hawkesworth [1851],** it was held that goods found in a shop, though given up by the finder to the shopkeeper to adverise them may be recovered from the shop keeper by the finder of goods.

Liabilities of finder of lost goods:-

The Liability of the finder is implied by law even there is no contract of bailment.

The following are the obligations of the finder of goods.

(i) He must take all necessary and reasonable care to keep the goods in a good condition.

(ii) He must take all reasonable efforts to trace-out the real owner of the goods.

Check Your Progress Questions

3. When can a finder of goods sell the goods?

(Space for Hints)

(iii) He should not use the goods for his own purpose.

(iv) He should not mix the goods with his own goods.

(v) He must return the goods to the real owner.

If the finder fails to perform such obligation, he is liable to the true owner on the principles of quasi - contract.

Rights of the finder of lost goods:

The finder of lost goods is entitled to the possession of the goods as against the whole world except the true owner.

[i] Right to Lien:

The finder can exercise a particular lien on the goods until he receives the expenses incurred in preserving the goods in good condition and to find out the real owner of the goods. Thus, the finder is entitled to retain the goods against the owner in the following cases.

[i] where the owner cannot with reasonable diligence be found out.

[ii] where the owner refuses to pay lawful charges of the finder.

In Hollins vs. Fowler [HL502] the plaintiff Hollins picked up a diamond on the floor of the defendant Fowler's shop and he handed over it to the defendant to keep it till the owner is found. In spite of best efforts by way of wide advertisements in the newspaper etc, the true owner could not be found, so, after some time, the plaintiff claimed to handover the diamond to him. But the defendant refused to return the diamond.

It was held that the defendant should return the diamond to the plaintiff [Finder of lost diamond] as he was entitled to retain it against the whole world except the true owner

[ii] Suit for Reward:

Where the owner has offered a specific reward for the return of his lost goods, the finder of the said goods is entitled for that reward. If the true owner fails or refuses to give the reward, the finder may sue for such reward and he may retain the goods until he receives it.

[iii] Right to sell:

The finder of lost goods being a bailee, is not entitled to sell the goods. Anyhow, he may sell the goods in the following conditions prescribed in section 169 of the Indian contract Act.

[i] The thing should be commonly the subject of sale.

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[ii] The true owner of the goods cannot be found despite reasonable efforts by the finder

[iii] The goods are in a perishable condition or of losing the greater part of it's value

[iv] When the true owner refuses to pay the lawful charges to the finder for keeping the goods in good condition and the expenses to trace-out the true owner (or)

[v] When the lawful charges of the finder in respect of the things or goods found, exceeds two-thirds (2/3) of it's value.

9.3.5. MONEY PAID OR THINGS DELIVERED BY MISTAKE OR COERCION (Section:72)

"A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it".

Section 72 imposes a quasi - contractual obligation on a person to whom money has paid, or things delivered by mistake or under coercion, to repay that money or return the things delivered.

Illustrations;

a) A and B jointly owe Rs. 1,000 to C.A alone pays the amount to C and B not knowing this fact, pays Rs. 1,000 over again 'C', 'C' is bound to return this amount to 'B'

b) 'A' railway company refuses to deliver up certain goods to the consignee except upon the paymentof an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

The term 'mistake' in section 72 comprised within its scope a mistake of law and mistake of fact. Under section 72, payments made under mistake of fact aswell as mistake of law can be recovered. This section does not make any distinction between money paid under mistake of law or mistake of fact.

The leading case on this point is **Sales Tax officer, Banares Vs. Kanhaiya Lal Mukand Lal saraf AIR 1959 SC 135.** a certain amount of sales tax was paid by a firm under the uttar pradesh Sales Tax law on its forward transactions in bullion. Subsequently such a levy of sales tax on such transactions was declared by the courts to be ultravires. So, the company filed a suit claiming refund of the tax paid by it. The supreme court held that the payment made under mistake of law is recoverable and the firm was allowed to recover back the tax.

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Payment 'by mistake' under Section 72 must refer to a payment which was not legally due and which could not have been enforced; the mistake is in thinking that the money paid was due when, infact, it was not due.

In **Trilokchand Motichand Vs. Commissioner of Income Tax AIR, (1967), Section. 110,** it was held that 'payment of tax under a law which later on was declared to be 'ultra vires' is not a payment under mistake of law within the meaning of section 72"

Now, let us see some examples of mistake under section 72.

In **Ketrabarsappa Vs. Indian bank AIR 1987, Kant 236,** where a mistaken entry in a customer's account in a bank and the customer withdrawing the amount. He would be bound to pay back the amount alongwith interest.

In **Associated cement co Ltd Vs. Union of India AIR 1998 MP.241,** where the railway authorities charged extra fare under the mistaken belief that the goods would have to be carried by a longer route, they were ordered to refund the extra fare.

In a recent case of **State Bank of India Vs. National open school society, AIR 2004 Del 306**, saving bank account credited by bank by mistake. On realising the mistake on information by the customer, the entry was reversed and interest sought to be recovered from the customer for using the moneyit was. Held that it was not allowable.

In English law, this section is based upon "action for money had and received". Such an action lies in England for recovery of money paid to the defendant under a mistake of fact.

In the circumstances mistakenly believed to exist, there should be legal liability to pay otherwise, the amount paid cannot be recovered as it would be a voluntary payment.

In **Morgan vs Ashcroft (1938)1 K.B49** a book maker made an over payment to a person who had placed a bet with him. He brought a suit for recovery of the excess amount paid by him. It was held that the contract related to a gaming transaction and there was no legal liability to make payment and therefore the payment made in those circumstances could not give rise to any liability for a refund of that excess amount.

Payment made under coercion:

The term "Coercion" in this section should be understood in its general and ordinary sense (i.e) in the dictionary sense and the definition of 'Coercion' in section 15 of the contract Act, is not applicable here. It has been clarified by

the privy council in **kanhaiyalal vs. National Bank of India, (1913) 40, cal 598 (PC)** that the term 'coercion is used in the ordinary dictionary meaning in this section from whom he had collected the sales tax. Coercion in Section.72 means only that the payment is made under compulsion & pressure and not voluntarily. So, any payment induced by compulsion or under pressure of circumstances, such as prevention of the execution of a decree on a property in which the party paying is interested, would be recovered under section.72. But, the action should be brought within 3 years from the date of payment.

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In **Forbes Vs. Secretary of state for India (1915) 42**, cal, 151 where money was paid for incometax under a threat of attachment, it was held that the amount was recoverable as it was paid under coercion, covered by this section.

9.4. QUASI-CONTRACTS IN ENGLISH LAW:

There are variety of quasi - contractual obligations recognised by English Law.

(I)Voluntary payments:-

a) Payment made under Mistake of fact:

The payments made under a mistake of fact can be recovered and the pary paying would have been liable to pay if the mistaken fact were true. One of the essential conditions of this action is that 'the mistake must be as to a fact which, if true, would make the person paying liable to pay the money.

In **kelly vs. Solary (1841),** where money was paid under a life insurance policy which to the knowledge of the company had lapsed, but the fact of lapse having been forgetten at the moment, it was held that the insurance company was entitled to recover back the money.

In an another similar case of **Norwich union Fire Insurance Society Ltd vs. price (W.H.) Ld (1934) AC.455,** the payment was made under a policy of marine insurance under the mistaken knowledge that cargo of lemons had perished whereas infact it was only sold en route. The privy council held that the money was recoverable, because of the payment was made under mistake of fact.

b) Payment made under an ineffective contract:

Three kinds of situation are generally considered in such cases, viz,

(i) total failure of Consideration

(ii) Money paid under a void contract and

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(iii) Money paid under an illegal contract. When one of the parties to a contract has paid money in the performance of his part, but the other party fails to do his part of obligation, the former has an option either to sue for breach of contract or to treat the contract as at an end and recover back his money under quasi-contract. Quasi-contractual remedy arises when there has been a total failure of consideration. In **Rawland vs. Divall (1923).** It was held that if the buyer has to return the goods on account of there being no title to the seller to sell, the buyer can recover the whole of his price without any deduction for use value. In such cases, there is a total failure of consideration.

The effects of void and illegal contracts have already been discussed earlier.

(c) Payment made under compulsion:

When any payment is made by a person to another under compulsion or coercion, he is entitled to recover the money paid. In **maskell vs. Harner [1915] 3K.B. 106,** it was held that where the owner of a market realised tolls from a shopkeeper by sezing his goods. But he had no such auhority to collect tolls and therefore the shopkeeper was allowed to reclaim the toll money paid. Here, in case such fee or toll is paid without improper pressure or compulsion, there would be no right of recovery.

[ii] Payments to the Defendant's use:

When the plaintiff makes any payment to the defendant's use under any pressure or legal compulsion and subsequently he fails to pay that amount obligation on the defendant to repay the said amount to the plaintiff.

Two principles seem to govern this kind of quasi-contractual liability. One of them is that (i) the payment by the plaintiff should have been made under pressure and not voluntarily and (ii) the defendant should have been bound to pay and has been relieved of his liablity by the payment made by the plaintiff.

For example, A person pays premium due upon the policy of another without his request and without any compulsion, he cannot recover that amount **[Falcke Vs. Scottish Imperial Insurance Company [1886].**

In **Monmouthshire county council vs. Smith [1957] 2 QB 154,** Justice, Lynskey observed that, the essence of the rule is that there must be a common liability to pay money to a particular person; that the plaintiff has been compelled to pay it by law; that the defendant is liable to pay that money; and that the defendant's debt or liability has been discharged by the plaintiff's payment".

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In the case of **Exall Vs. Partridge [1799],** the plaintiff had left his carriage upon the premises in which the defendant was living as a tenant. The land lord was lawfully seized all the goods on the premises including the carriage for non-payment of rent and would have sold them in execution of his claim. The plaintiff paid the outstanding rent to get back his carriage and then sued the defendant for the amount. The court held that the plaintiff was entitled to claim that amount because the payment was made for the defendant's use under some pressure & compulsion to save his carriage.

9.5. iii. QUANTUM MERUIT

In addition to the above said instances of quasi-contracts, a claim can also, instances of be made on the basis of 'Quantum-meruit'. The term 'Quantum meruit means "as much as earned". Where a person seeks to recover reasonable remuneration for anything done lawfully or delivered under a contract, he is said to sue on quantum meruit. When a party has in the performance of his contract done some work or rendered some service the other party requdiates the contract, and and the further performance of the contract becomes impossible. He may recover reasonable compensation for the work or service. In such cases the law will infer a promise to pay quantum meruit. (i.e.) as much as the party doing the work or service has deserved. It covers a case, where the affected party, had done some part of work at the time of breach of contract but not all the work which he is bound to do under the contract and seeks a compensation for the value of work done.

The case **plinche Vs.Colburn (1831)** is an authority for this principle.

In this case the plaintiff was the author of several dramatic entertainments. He was engaged by the defendants, who were the publishers of a work called 'The Juvenile Library' to write for that work an article to illustrate the history of armour and costumes from the earliest times, for which he was to be paid 100 guineas. The plaintiff made various drawings and prepared a considerable portion of Manuscript. When the defendant discontinued the Jurenile Library, the plaintiff claimed a sum of 50 guineas for the part which he had prepared. It was held that he was entitled to that amount according to the rule of Quantum - Meruit.

Similarly, in **clay Vs. Yates (1856)** a printer, having printed most of the work, refused to complete it because the dedication was libellous, he was held entitled to recover the printing charge on 'quantum meruit'

Check Your Progress Questions

4. What is quantum - Meruit?

The claim of quantum meruit arises when a person in performance of his contract has done some work or rendered some service under a contract and the

(Space for Hints)

other party repudiates the contract or the further performance of the contract become impossible, then the other party own claim remuneration for the work, which he has already done.

For the application of this doctrine, two conditions must be fulfilled.

(i) It is only available if the original contract has been discharged.

(ii) The claim must be brought by a party not in default.

The object of allowing a claim on quantum merit is to recompensate the party or person for value of work which he has done, under a contract. Damages are compensatory in nature but quantum meruit is restitutory. It is reasonable compensation awarded on implication of a contract to remunerate.

The claim for quantum meruit arises in the following cases.

(1) When one party abandons or refuses to perform the contract:

When the completion of the contract by one party has been prevented by the act of the other party to the contract, he may sue on a quantum meruit, for the value of what he has already done.

Examples : (a) C engaged P to write a book on ancient armoury to be published by instalments in a periodical called "The Juvenile Library" for the fee of $100. After a few issues of the periodical had appeared, it was abandoned. Held, P could recover on quantum meruit for the work he had done under the contract **(Planche vs. Colburn, (1831) 8 Bing. 14).**

(b) P wrongfully revoked A's (his agent's) authority before A could comlete his duties. Held, A could recover quantum meruit for the work he had done and the expenses he had incurred in the course of his duties **(De Bernady vs. Harding, (1853) 8 Es. 22).**

(2) When an agreement is discovered to be void (Sec.65)

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

In **Craven-Ellis Vs. Cannon Ltd., (1936) 2 K.B. 403,** The plaintiff was employed as a managing director in a company. After he rendered service for three months, it was found that the directors were not qualified to appoint him. It was held that the plaintiff could recover remuneration for the services rendered by him on quantum meruit

Check Your Progress Questions

5. When does a claim on quantum meruit arise?

(3) When services were not intended to be rendered gratuitously (Sec.70).

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When a thing is lawfully done or goods are supplied by a person without any intention to do so gratuitously to another person and such other person enjoys the benefit thereof, he is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

(4) When there is an express or implied contract to render services but there is no agreement as to remuneration.

In such a case, reasonable remuneration is payable. What is reasonable remuneration is determined by the Court and this reasonable remuneration is quantum meruit.

In **Upton Rural District Council vs.Powell, (1942) 1 All E.R. 220),** there was an implied agreement between Powell and a fire brigade for the services of the brigade. Held that, reasonable remuneration was payable by Powell for the services received by him.

(5) When a contract is divisible.

When a contract is divisible and the party not in default has enjoyed the benefit of the part performance, the party in default may sue on quantum meruit. But if the contract is not divisible, i.e., where it requires complete performance as a condition of payment, the party in default cannot claim remuneration on the ground of quantum meruit.

(6) When an indivisible contract is completely performed but badly.

When an indivisible contract for a lump sum is completely performed, but badly, the person who has performed the contract can claim the lump sum: but the other party can make a deduction for bad work.

Examples: [a] A agreed to repair B's house for £ 265, payable on completion in accordance with a specification. He did the repairs but these were defective. Held that 'A' was entitled to recover £ 265, less a reduction in respect of the defective work **(Dakin (H) & Co. Ltd. Vs. Lee, (1916) 1 K.B. 566].**

[b] P agreed to decorate D's flat for a lump sum of £ 750, certain requirements having been laid down. P did the work but D complained of faulty workmanship. It cost D £ 204 to remedy that defect. Held, P could recover from D, £ 750 less £ 204 **(Hoenig Vs. Issacs, (1952) All E.R.176).**

The general rule is, that where a party to contract has not fully performed his part where the contract stipulates as a condition of payment, he can bring no

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action for payment for the work done by him. But if a party is prevented from completing his part of the contract by the other party, he may sue on a quantum meruit for the value of what he was already done.

9.6. SUMMARY :-

From the above discussion, you can come to a clear idea about the subject of Quasi - contract under English law and Indian law. This chapter elaborately explains the theories relating to basis of Quasi - contract and various common instances of Quasi - contract and the term quantum Meruit, with lot of illustrations and case laws.

9.7. KEY WORDS

Abandon	-	Carefree attitude; to forsake
Attribute	-	Natural quality of person or thing
Armour	-	A metal-covering for defence.
Annulment	-	Make null an void; put on end
Conscience	-	Conscious awareness of one's right or wrong
Enrichment	-	Conscious awareness of one's right or wrong
Furnish	-	to supply
guineas	-	Gold coin (England) worth of 21 shillings
gratuitous	-	Thankfulness
Retention	-	Act of retaining
Unjust	-	Unfair, Biased, wrongful

9.8 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **9.1**
	Question No.2	...	Refer Section No. **9.3.3**
	Question No.3	...	Refer Section No. **9.3.4**
	Question No.4	...	Refer Section No. **9.5**
	Question No.5	...	Refer Section No. **9.5**

9.9 EXERCISE QUESTIONS

A. Short answer Questions

1. Discuss the rights and liabilities of Finder of lost goods?
2. When an obligation to pay for non - gratuitous acts arise?
3. Explain "Quantum Meruit" with case laws?
4. Explain the two theories relating to quasi-contract?

B. Long answer questions

(Space for Hints)

1. What is quasi -contract? Enumerate the quasi - contract deals with under the Indian contract Act, 1872?

   (or)

   Explain the various instances of Quasi-contract?

2. Under the Indian contract Act, there are "certain relations resembling those created by a contract" Explain. (or) what are the obligations resembling those created by contract?

3. "Quasi contracts rest on the ground of equity that person shall not be allowed to enrich himself Unjustly at the expense of another" - Explain.

4. What do you understand by quantum meruit? When does the claim on quantum meruit arise?

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UNIT – 10
SPECIFIC RELIEF ACT 1963

INTRODUCTION

'Specific Relief' means the relief in specific. By nature, it is a remedy which aims at the exact fulfilment of an obligation or the specific performance of a contract. Specific performance is an equitable relief given by the court to compel a person to perform his duty which he has undertaken by a contract. Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law. The law relating to specific relief including specific performance of contracts is contained in the specific Relief Act, 1963. This act provides for specific relief by way of (i) Recovery of possession of movable and immovable property, (ii) Specific performance of contracts, (iii) Rectification of documents, (iv) Rescission of contracts, (v) Cancellation of instruments, (vi) Declaratory decrees and (vii) Preventive relief by way of Injunctions.

UNIT OBJECTIVES

- To understand the nature and meaning of specific Relief.
- To study about the provisions relating to Recovery of possession of property.
- To analyse the principles governing specific performance.
- To study about the contracts which can and cannot be specifically enforced.
- To learn about Rectification and cancellation of instruments & Rescission of contract.
- To know about the declaratory decrees and preventive relief.

UNIT STRUCTURE

10.1 Origin and Nature

10.2 Recovery of possession of property

10.3 Specific performance of contracts

10.4 Rectification of instruments

10.5 Rescission of contracts

10.6 Cancellation of Instruments

10.7 Declaratory decrees

10.8 Preventive relief

10.9 Summary

10.10 Key words

10.11 Answers to check your progress

10.12 Exercise questions

(Space for Hints)

10.1 ORIGIN AND NATURE OF SPECIFIC RELIEF

In England, originally the only remedy available to an aggrieved party under the common law was the remedy of damages. In many cases, as for instance in the case of branch of a contract, the remedy of damages was found to be inadequate. So, the courts of equity in England invented certain remedies to obviate such hardship. These remedies are called specific Reliefs. These remedies are also called as equitable remedies.

The expression 'specific Relief' is used in contrast to compensatory relief, in a contract. Such specific reliefs direct the party in default to do or to forbear the thing which he is bound to do or forbear or make a declaration of rights which the nature of the case may require.

For example: 'A' agrees to sell his house to 'B'. 'B' and subsequently if he refuses to sell his house to 'B'. Here, can enforce the contract specifically. (i.e) the court may pass an order directing 'A' to convey his house to 'B' and execute sale deed in favour of him. This remedy of damages is not an adequate remedy is granted by the court only if it finds that remedy in such a case.

Now let us see an another instance for specific relief. 'A' trespasses into the house of 'B'. Here, 'B' has three remedies in the court of law viz (i) Legal action in a criminal court for punishment to'A' (or) (ii) a suit for compensation in a civil court for unlawful possession (or) (iii) a suit for recovery of possession and for A's ejectment. Among those three remedies, the remedy under the third category is specific relief because 'B' seeks to obtain the thing to which he is entitled (ie) recovery of possession and not compensation.

10.1.1 General principles

The general principle upon which equitable relief is granted may be analyzed as under : 1. Dr. Hanbury says that "the rationate of specific performance is that common law remedy of damages was often inadequate. It would in effect compel a promisee to sell his right to performance for a pecuniary consideration. There are many cases in which personal element enters into such an extent that no amount of damages can really be a compensation to the disappointed promisee, who wants performance and performance only. To give him unwanted check is a

Check Your Progress Questions

1. What is meant by specific Relief?
2. State the important maxims of equity?

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condonation of inequity". From the above definition, it is clear that the ground of the equitable remedy is the inadequacy of the legal remedy. The court is not bound always to grant such specific relief merely because it is lawful to do so and it is the discretionary power of the court to award specific performance. Moreover, while granting these remedies the courts follows the following principles of equity.

(i) He who comes to equity must come with clean hands

(ii) He who seeks equity must do equity and

(iii) Delay defaults equity.

In our country the law as to specific relief was very first codified in the specific Relief Act, 1877 and this Act has been repealed and replaced by the specific Relief Act, 1963, which came into force on the 1st March 1964.

It is "an Act to define and amend the law relating to certain kinds of "specific relief" obtained in civil suits. The former Act, 1877 was originally drafted upon the lines of the draft of New York Civil Code 1862, and its main provisions embodied the doctrines evolved by the English equity courts. In England, Specific relief is granted by following the system of administration of justice by giving rise to novel and potent legal remedies which were then unknown to the Common Law courts. The principles developed over the years in England have been crystallized and codified in India. The present Act deals with the same reliefs as were covered by the earlier Act.

The present Specific Relief Act, 1963, deals with certain kinds of equitable reliefs and they are : (i) Recovery of possession of property, movable and immovable; (ii) Specific performance of contracts (iii) Rectification of Instruments; (iv) Rescission of contracts (v) Cancellation of Instruments (vi) Declaratory decrees and (vii) Injunction. The old Specific Relief Act. 1877 dealt with some other kinds of specific reliefs also viz., (1) Appointment of Receivers and (2) Enforcement of Public duties. These two forms of specific reliefs have been omitted in the New Act for the reason that the former is dealt with by the code of civil procedure and the latter by the constitution of India. The other forms of specific relief mentioned in the Code of Civil Procedure and statutes such as transfer of property Act, Trust Act, Partnership Act, are different in origin and nature and are not included in this Act. Sec. 3 of the Specific Relief Act., 1963 lays down that except as otherwise provided herein, nothing in this act shall be deemed : (a) to deprive any person of any right to relief, other than specific performance which he may have under any contract; or (b) to affect the operation of the Indian registration Act, 1908, on documents.

10.2. RECOVERY OF POSSESSION OF PROPERTY:

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Possession is the evidence of ownership. It confers a good title against all, but not against the rightful owner. A person in possession can enjoy the property in his possession against everyone excepting the true owner.

When a person is dispossessed of his quiet and undisturbed possession of property, but not in due course of law, the specific relief Act provides some remedies. The rules regarding the recovery of possession of property are explained in sections 5 to 8 of the specific Relief Act.

10.2.1. RECOVERY OF POSSESSION OF IMMOVABLE PROPERTY

Section 5 and 6 of the specific Relief Act deal with the recovery of possession of immovable property.

Section 5 provides that a person entitled to the possession of specific immovable property, may recover it in the manner provided by the code of civil procedure 1908.

This section deals with action for recovery of possession of specific immovable property in the court of law on the basis of title. But section 6 deals with a summary remedy on the basis of possession.

The essence of the section is that whoever proves a 'better title' is a person entitled to possession. The title may be on the basis of ownership or possession. In **Bajranglal Shivchand Rai Ruia.Vs. Shashikant Ruia (2004) 5, SCC, 272,** It was held that the plaintiff would have to establish his title for success of his suit.

The continuing exercise of a claim to the exclusive use of a thing constitutes the possession of it.

The procedure given by this section must be in accordance with the provisions of the civil procedure code, which provides for the institution of suit and execution of decree in accordance with provisions of order 21 Rules 35 and 36 of code of civil procedure. The proceedings under this section are of summary nature and the question of title is ignored in these proceedings. For example, 'A' enters into peaceful possession of a land, claiming it as his own. Even though he has no title to it, he can sue another who has forcibly ousted him from possession and who has no better to it. Because 'A' even though he has no legal title, at least has a possessory title.

Thus, a suit under section 5 is an ordinary suit under the general law and the plaintiff has to prove that he has a better title.

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In a recent case of **Rajeshwari. Vs. T.C. Saravanabava** (2004) 1, SCC 551, the supreme court held that a decision as to recovery of possession of a specified part of the property in question may not constitute 'res judicata' in respect of any subsequent suit proceedings on the entire property.

It is a well-established principle of law that a person who has been in long continuous possession of an immovable property can protect the same by seeking an injunction against any person other than the true owner. Even, the owner of the property can get back his possession only by resorting to the due process of law. **[Prataprai Kothari. Vs. John Braganza (1999) 4 sec 403].**

10.2.2. SUIT BY PERSON DISPOSSESSED OF IMMOVABLE PROPERTY (section 6)

Section 6 of the specific Relief Act, provides for a suit by a person dispossessed of immovable property.

Under section 6 (1) "If any person is dispossessed without his consent of immovable property, otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, not with standing any other title that may be set up in such suit.

Illustration

A is an possession of a residential house. He is dispossessed unlawfully by 'B'. 'A' is entitled to sue 'B' for recovery of possession although 'B' may be have a good title to it.

(i) The main object of this section is to discourage people from taking the law into their own hands however their title may be good.

(ii) to provide a summary and speedy remedy through civil court to a person dispossessed of immovable property otherwise than in due course of law, or recovery of his possession.

Section 6 provides a speedy and summary remedy for recovering of possession without establishing title to a person, who being, whatever his title, in possession of immovable property, is illegally ousted there from without his will and consent otherwise than by due course of law. To quote **'Pollock'** and **'Mulla'**. "This section affirms an important principle of substantive law, disputed rights are to be decided by due process of law and not otherwise, and existing peaceful possession will be protected against disturbance without regard to the question of it's origin."

Possession as used in section 6 is prime facie evidence of good title against all other than the true owner and if a person, who is in possession is dispossessed, he has a right to claim back possession from the person who dispossessed him.

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10.2.3. LIMITATION ON SECTION 6

Section 6 has some limitations. According to section 6(2), no suit under this section shall be brought,

(i) after the expiry of six months from the date of dispossession.

(ii) No suit shall lie against Government.

(iii) According to section 6(3), no appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order to decree be allowed.

Section 6(4) provides that the person against whom a decree may be passed under clause 1 of section 6, [s.6(i)] may, not with standing such a degree sue to establish his title to such property and to recover possession thereof.

10.2.4 CONDITIONS FOR APPLICABILITY

Section 6 is applicable only if the plaintiff proves the following facts, for recovering his specific immovable property.

(i) that the plaintiff was in juridical possession of the specific immovable property.

(ii) that he has been dispossessed of the immovable property.

(iii) that the dispossession took place without his consent and otherwise than in due course of law. (example : by a trespasser).

(iv) that the dispossession took place within six months from the date of the suit.

(v) the suit should be for recovery of possession and it should not be brought against the Government.

Case laws

In **Prem Sharma. Vs. Nishi Sharma, AIR 2003 H.P. 45,** it was held that entries in the Municipal Register of assessment and the report lodged with the police about dispossession showed that the complainant was in possession of the house immediately before he was dispossessed. So, relief for recovery of possession was granted.

In **Tirupati Devasthanams. Vs. K.M. Krishnaiah (1998) 3 SCC 331,** the court held that where the suit for possession could not be filed within 6 months, a regular suit could be filed there after.

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Even a trespasser is allowed to continue on the property when the owner of property sleeps upon his rights and makes no efforts to remove him, he will gain possession under section 6. In **Rame Gowda. Vs. Varadappa Naidu (2004) 1 scc 769,** the supreme court held that a person who is in settled possession cannot be summarily dispossessed and the settled possession even of a trespasser may be protected under section 6.

A tenant who continues in possession of the property after the expiry of the tenancy, cannot be regarded as trespasser, his entry is lawful and he cannot be forcibly evicted. If he is so evicted, he can invoke the protection of section 6.

In **Krishna Ram Mahale. Vs. Shobha Venkat Rao** (1989) 4, SCC 131, the supreme court held that, the possession of a tenant after the termination of the tenancy continues to be a juridical possession and his right to possession remains unless the owner gets a degree of eviction against him. Till then, if he is dispossessed, he is entitled to seek restriction of his possession.

Under section 6 (4), "No appeal or review shall lie against any order or decree passed in a suit under section 6." But when a decree or order is passed in violation of the provisions of section 6, a revision petition under section 115 of C.P.C. may lie to the Highcourt.

In **Mahaboob Rasha. Vs. A.R. Viswanatha Chetty AIR 1994 kant 350,** the plaintiffs held a suit against the defendant for possession of the premises of which they were in possession till they dispossessed by the defendant without their consent, otherwise in due course of law, the lower court held that the plaintiffs are entitled for possession of the suit property. In this case, the high court held that when a decree is passed in violation of the provision of section 6 would not bar a revision petition.

10.2.5 DIFFERENCE BETWEEN SECTION 5 AND SECTION 6 :

Section 5 and 6 of specific Relief Act give alternative remedies and are mutually exclusive. The points of difference between an action for possession under section 5 &6 are as follows.

(i) If a suit is filed under sec.6, for recovery of possession, the plaintiff need not prove a better title against the occupier and a person, dispossessed may recover possession, merely by providing previous possession and subsequent wrongful dispossession and the question of right or title cannot be raised.

But under section 5, a person dispossessed must get possession on the basis of title. Thus, under section 5, the claim is based on title. While so, under section 6, the claim is on possession.

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(ii) Under section 5, the plaintiff has to file a regular suit for ejectment, whereas, section 6 provides for a summary remedy for unlawful dispossession of immovable property.

(iii) The period of limitation under section 5 is 12 years. Whereas under section 6, the limitation period is only for six months from the date of dispossession.

(iv) The remedy conferred by section 6 is the possessory action, in which the plaintiff seeks restoration of possession on the strength of his prior possession and he need not have a better title. Whereas, the remedy under section 5, is a proprietory action in-which the plaintiff can succeeded only if, he can prove his better title than what the defendant has.

(v) A suit against the government under section 5 is possible. Whereas under section 6 it is not possible.

(vi) Appeal or review can be filed against orders passed under section 5. But under section 6, it is not possible.

(vii) Any person failing in a suit, under section 5 will not be allowed to sue under section 6. But a person failing in a suit under section 6 can file a suit under section 5.

10.2.6. RECOVERY OF POSSESSION OF SPECIFIC MOVABLE PROPERTY: (section 7 & 8)

Section 7 & 8 deal with the recovery of specific movable property. Section7 deals with the circumstances where the plaintiff has to file a regular suit for recovery of the movable property.

Section 7 lays down that, a person entitled to the possession of specific movable property may recover the same in the manner prescribed by the code of civil procedure.

Explanation I provides for the suits filed by the trustees. By that, a trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation II provides that, "A special or temporary right to the present possession of movable property is sufficient to support a suit under this section". Special or temporary right specified in Explanation II arises (a) by an act of the owner of goods e.g. by bailment, Pawn or pledge or lien; or (b) otherwise than

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by an act of the owner, e.g. by an unauthorized pledge or sale, or finder of lost goods.

This section in particular provides for the recovery of movable property "in specific". The illustrations in the old section are omitted and the new section corresponds to section 10 of the Act. The illustrations in old section 10 were as follows: 1. 'A' bequeaths a land to 'B' for his life, with remainder to C. 'A' dies, 'B' enters into the land but 'C', without 'B's consent, obtains possession of the title deeds, 'B' may recover them from 'C'.

2. 'A' pledges certain jewels to 'B' to secure a loan. 'B' disposes of them before he is entitled to do so. 'A' with out having paid or tendered the amount of the loan, sues 'B' for possession of the jewels. The suit should be dismissed, as 'A' is not entitled of their possession, whatever right he may have to secure their safe custody, [(Donald vs. Sucking (1866)]

3. 'A' deposits books and papers for safe custody with 'B', 'B' loses them and 'C' finds them but refuses to deliver them to 'B' when demanded. 'B' may recover them from 'C' subject to C's right, if any under Sec. 168 of the Contract Act dealing with rights of finder of lost goods to sue for reward.

The main ingredients of this section (sec.7) are

(i) the plaintiff must be entitled to the possession of movable property.

The possession may be either by ownership or by. Virtue of a special or temporary right as provided by Explanation 2 of section 7. A special or temporary right may arise either by a) the act of the owner of goods, Bailment, pawn, etc b) not by the act of the owner of goods. For (e.g) finder of lost goods.

(ii) A person who does not have a right to present possession of movable property cannot maintain a suit under this section.

(iii) Property in question must be specific movable property. The term 'specific' means that, which is ascertainable. Thus, generally coins or grains are not specific movable property, because they cannot be distinguished from other coins or grains.

(iv) The specific movable property must be capable of being seized and delivered.

When the goods are not in possession or control of the defendant the plaintiff is not entitled to a decree for recovery of movable property, his only remedy is damages or compensation.

In **Oliver. Vs. Oliver (1861),** the plaintiff received a letter addressed to him by the defendant. Subsequently, the defendant got back the letter without

the plaintiff's consent. So, the plaintiff filed a suit for recovery of that letter. Held that, the plaintiff was entitled to recover the letter from the defendant.

Limitation Period

Article 91(b) of the Limitation Act, 1963, prescribes a period of three years limitation for the suit for recovery of movable property from the date when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

10.2.7 Specific Delivery of Movable Property

Section 8 deals with the delivery of movable property to a person entitled to immediate possession. Section 8 lays down that "Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled, to its immediate possession in any of the following cases (a) When the thing claimed is held by the defendant as the agent or trustee of plaintiff (b) When the compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed. (c) When it would be extremely difficult to ascertain the actual damages caused by its loss and (d) When the possession of thing claimed has been wrongfully transferred from the plaintiff".

For example : when the idol of a family temple is in the custody of a retired priest, he is bound to return it to the family.

To apply section 8, the following are the main ingredients.

(i) the defendant has possession or control of a particular article.

(ii) such article is movable property.

(iii) the defendant is not the owner of the Article.

(iv) The plaintiff is entitled to immediate possession.

The explanation of section 8 deals with the onus of proof under clauses (b) & (c) of section 8 (which is referred earlier), which is placed on the defendant and the defendant has to prove that the compensation in money would be adequate relief and it would not be difficult to ascertain the actual damage caused by the loss of the things claimed by the plaintiff.

The illustration appended to the old section in Explanation II of the former Act are interesting to note in this context. (1) 'A' proceeding to Europe, leaves his furniture in charge of 'B' as his agent during his absence. 'B' without A's authoirty, pledges furniture to 'C' knowing that 'B' had no right to pledge the

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furniture advertises it for sale, 'C' may be compelled to deliver the furniture to 'A' for he holds it as A's trustee (based on **wood Vs Rowcliff (1844)**.

(2) 'x' has got possession of an idol belonging to y's family, and of which 'y' is the, proper custodian. 'x' may be compelled to deliver the idol of 'y'.

(3) 'A' is entitled to a picture by a dead painter and a pair of rare Chinna vases which 'B' has possession of them. The articles are of too special in character and is extremely difficult to ascertain its market value. 'B' may be compelled to deliver them to 'A'. (based on the case law **falcke Vs. Gray (1859)**.

In **Subbarayalu.Vs. Annamalai Chettiar 1946 Mad 174,** the plaintiff delivered to the defendant a cinematograph projector. The defendant was to pay the price in instalments. If there was default, the plaintiff was given the option to demand the return of the machine. The defendant committed default and therefore the plaintiff demanded the return of machine. It was held that the defendant was holding the projector in a fiduciary capacity and he was directed to deliver the machine to the plaintiff.

10.2.8. Difference between section 7 & 8

(i) Under section 7, a person having a special or temporary right to the present possession may bring a suit even against the owner of the property. Whereas, under section 8, no suit can be brought against the owner.

(ii) Under section 7, a decree is for the return of movable property or for the money value thereof in the alternative, while under section8, the decree is only for the return of the specific article.

10.3 SPECIFIC PERFORMANCE OF CONTRACTS

Specific performance is an equitable relief given by a court in case of breach of contract in the form of a judgement that the defendant has to actually perform the contract according to its terms and stipulations.

When one of the parties to a contract fails to perform his part of legal obligation under the contract, the other party (aggrieved party) may file a suit either for the actual performance of the contract or for damages or compensation. The suit for actual performance of the contract is described as the specific performance of contract.

Check Your Progress Questions

3. Define 'Specific' performance?

As already seen, specific relief or performance as the case may be, is the exceptional rule and the normal remedy for the breach of contract is the recovery of damages. It is further in the nature of "equitable relief". A decree for specific

performance is a decree issued by the court. Sections 9 to 25 of the specific Relief Act, 1963 deals with the provisions of specific performance of contract.

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Definitions

Now, let us see some important definition of specific performance.

Pomery defines "specific performance", as consist in the contracting party's exact fulfillment of obligation which he has assumed in his doing or omitting the very act which he has undertaken to do or omit". **Halsbury** explains 'specific performance as an equitable relief given by the court in case of contract in the form of a judgement that the defendant do actually perform the contract according to its terms and stipulation'.

In the words of **Fry,** 'the specific performance of a contract is its actual execution according to the stipulations and terms; and is contrasted with damages or compensation for the non-execution of the contract'.

10.3.1. GENERAL PRINCIPLES RELATING TO SPECIFIC PERFORMANCE : The Rules as to equity

The specific performance being an equitable relief, many legal maxims of "equity" are applicable to various principles laid down by the specific Relief Act. The following are the cardinal rules relating to equity.

(i) He who seeks equity must do equity :

This is a well-known maxim of equity. The meaning of this maxim is that, the plaintiff seeking the aid of the court of equity must himself do equity. The relevant provisions embodying the above principles are contained in sections 64 and 65 of the contract Act, which are stated that, the party who was received any benefit under a void or void able contract is made to restore such benefit or make compensation to the party from whom , he was received it. Section 33 (1) dealing with power of court to require the party for whom an instrument is cancelled to make compensation also embodies the above said rule of equity. Likewise, section 12, dealing with specific performance of part of contract, also illustrates this maxim.

(ii) Equity acts in personam :

Specific performance is one of the earliest examples of the maxim that 'equity acts in personam' (aequitas agit in personam). The specific performance and injunction are reliefs which can be entirely obtained through the personal obedience of the defendant. In a leading case of **Penn.V. Baltimore (1750),** the scope of the jurisdiction to grant specific performance was considered by the

Check Your Progress Questions

5. Who may Obtain specific performance?

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court of chancery. In this case, the plaintiff and the defendant being in England had agreed for setting the boundaries of two provinces in America namely Pennsylvania and Maryland and the plaintiff sought specific performance of the contract. It was contended that it was not permissible as the property was out of the jurisdiction of the court. It was held that the plaintiff was entitled to specific performance and the court in such a case acts in personam. The High courts in India have all the power of equity for enforcing their decrees in personam.

(iii) He who comes to equity must come with clean hands :

It is well established that a person seeking redress from a court of equity must not himself be guilty of conduct which would disentitle him to the assistance of the court. It is expressed in the above said maxim. Specific performance being discretionary and relief granted where parties come to the court with clean hands. Section 17 dealing with contracts to sell property by one who has no title or who is a voluntary settler also illustrates this maxim. If the assent was obtained by the misrepresentation, concealment of fact or unfair practice of any party to whom performance would become due under the contract, specific performance would not be granted. If the performance of the contract would involve a hardship to the defendant would involve a hardship to the defendant whereas the non-performance of contract will not involve any hardship to the plaintiff, the court will not interfere to order for specific performance of the contract.

(iv) Delay defeats equity :

The person whole seeks the relief of specific performance must show that he has acted with diligence and good conscience. Equity will not assist those who slumber over their rights.

Delay in seeking relief by specific performance has been treated as a valid ground for refusing the relief. Lapse of time is a bar to specific performance if it was originally stipulated to be so or it was to be implied from the nature of the transaction or if it was great as to be evidence of abandonment of the contract.

This maxim is not applicable to legal or equitable claims to which the statute of limitation applies.

(v) Equity looks upon that as done which ought to have been done :

Equity treats a contract to do anything as if the thing were already done, but only infavour of person entitled to enforce the contract specifically and not in favour of volunteers. For example, a person who enters into possession of land under a specifically enforceable agreement for a lease is regarded in any court which has jurisdiction to enforce the agreement as being in the same position

as between himself and the other party to the agreement as if the lease had actually been granted to him. This is called the **rule in walsh. Vs. Lansdale.** This doctrine converts an equitable interest into a legal interest as between the parties.

In India, a transfer of future property for consideration operates as a contract to be performed in future. The contract enforced as soon as the property comes into existence.

(vi) Equity imputes an intention to fulfil an obligation :

Where a man is under an obligation to do an act, and he does some other act which is capable of being considered as a fulfilment of his obligation, the latter act will be considered to discharge the contract. The doctrine of accord and satisfaction and performance are based on this maxim Both depend upon the presumed intention to carry out an obligation.

(vii) The jurisdiction is discretionary :

The right to an equitable relief is discretionary one. According to section 20, the jurisdiction to decree specific performance is discretionary and not a matter of right of the parties. The court is not bound to grant such relief merely because it is lawful to do so. But, the direction of the court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a court of appeal.

Apart from the above said principles regarding discretion of court and the application of the maxims of equity, there are certain well recognised guiding principles in granting specific performance.

(i) Mutuality :

It is a general rule of equity that there shall be no specific performance without mutuality. It means two things (i) the court will not enforce the obligation of the defendant of specific performance unless it can also enforce the obligation of the plaintiff (ii) a decree of specific performance will not be made unless the contract is such that at the time when it was concluded it might have been enforced. The doctrine of mutuality was imported into the Indian law by the privy council decision in **Mir. Sarwarjan.Vs. Fakruddin (1912, 39 cal 232),** it was held that there could not be a suit for specific performance of a contract when the contract is for the purchase of immovable property by the guardian of a minor. Now, section 20 (4) of specific Relief Act has expressly given up this doctrine.

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(ii) Contract for personal service :

A contract for personal service is not specifically enforceable at the suit of either party. This principle has been made applicable to the cases of agency, partnership and apprenticeship. But, the plaintiff may be given some relief by way of injunction restraining the defendant from performing a like personal service for other persons.

(iii) Contract requiring constant supervision :

In case of contracts for the performance of which constant supervision of the court would be required, no specific performance would be granted.

10.3.2. CONTRACTS SPECIFICALLY ENFORCED

Section 10 & 11 of the specific Relief Act relate to contracts which can be specifically enforced. It may be recalled here that the remedy of specific performance being an equitable remedy, is at the discretion of the court. But the court is governed by certain well established principles in the exercise of this discretion. Sec. 10 of the Act enumerates the cases under which specific performance may be granted. The Section 10 in particular is subject to other provisions of the chapter on specific performance in the Act. Sec. 10 of the Specific Relief Act provides that, except as other wise provided in this chapter, the specific performance of any contract may in the discretion of the court, be enforced; (1) When there exists no standard for ascertaining by the court damage caused by the non-performance of the act agreed to be done, or (b) When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief'.

No standard to ascertain damages :

Specific relief may be given if there exists no standard for ascertaining the actual damage caused by non-performance of any agreed act. Story says, "The ground of the rule is the utter uncertainty of any calculation of damages as they must in such cases be in a great measure conjectural. The clause covers cases in which the subject matter is so unique that it would be impossible to say what it would fetch in the market. In other words, where the article agreed to be purchased and sold is a rare or precious article which cannot be procured elsewhere, e.g. in case of peculiar articles of antiquity, curios, agreement to sell ancient things etc.,

> **Check Your Progress Questions**
> 4. What kind of contracts can be specifically enforced?

For example : 'A' agrees to buy and 'B' agrees to sell an ancient picture by a dead painter and two rare china vases for Rs. 5000/-. Later on 'B' refuses to sell them. Here, 'A' may compel 'B' specifically to perform this contract because

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the value of the painting cannot be determined and there is no standard for ascertaining the actual damage which would be caused by it's non-performance.

(b) Compensation in money inadequate :

When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief, specific performance is permissible. [sec.10(b)].

On this principle if A agrees to lend money to B but fails to do so. B cannot claim specific performance. Similarly, if A agrees to sell to B 100 bales of cotton the contract is not specifically enforceable in these cases, recovery of damages in an adequate relief. On the other hand, if A agrees to sell a house to B, he may be compelled specifically to perform his promise. The breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. When shares are limited in number and are not ordinarily available in the market, it is quite proper to grant a decree for specific performance of a contract for the sale of such shares. Where, however, there is a regular market for the shares in question, the parties should be left to the remedy of damages at law since there can be no difference between one man's stock and another. A contract to take one or all shares in a company is specifically enforceable.

Under the explanation to this section, it is stated that unless and until the contrary is proved, the court shall presume that the breach of contract to transfer immovable property cannot be adequately relieved by compensation by money and that the breach of contract to transfer movable property can be so relieved except where such property is not an ordinary article of commerce of goods which are not easily obtainable in the market or when the property is held by the dependent as the agent to trustee of the plaintiff. Thus Explanation to Section 10 provides for a rebuttable presumption.

(c) Contract connected with trusts (sec. 11)

The law relating to cases in which specific performance of contracts connected with trusts are enforceable is incorporated in sec. 11 of the Act, which provides that except as otherwise provided in the Act. Specific performance of a contract may, in the discretion of the court, be enforced when the Act agreed to be done is in the performance wholly, or partly of a trust. But a contract made by a trustee in excess of his powers or in breach of trust cannot, however, be specifically enforced. For example, if A holds certain goods in trust for B, A wrongfully dispossess of the goods, the law creates an obligation on A to restore

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the same quantity of goods to B and may enforce specific performance of this obligation. From the points discussed above,

1) agreements to sell or transfer immovable property.

2) agreements to make leases

3) agreements to sell with a condition for repurchase.

4) Agreements to partitions.

5) Compromise of doubtful claims.

6) Family settlements and

7) agreements for sale of shares including a contract for the purchase of the share of a partner.

10.3.3. CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED (Section. 14)

Under the provisions of sec. 14 of the Act, certain contracts which from their very nature cannot be specifically enforced or which it is impossible to compel specific performance. They are as follows;

(a) A contract for the non performance of which compensation in money is an adequate relief cannot be specifically enforced.

(b) A contract which runs into such minute or numerous details or which is so dependant on the personal qualification or volition of the parties, for otherwise from its nature is such that, the court cannot enforce specific performance for its material terms cannot be specifically enforced. The real test underlying this provision is that the court should refuse specific performance where it becomes impossible for it to enforce it. This clause is widely worded and it is well established that contract involving personal services cannot be specifically enforced.

(c) A contract which is in its nature determinable is not specifically enforced.

Illustration :

A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed for if it were so performed, either A or B might at once dissolve the partnership it may be otherwise if the partner hip is for a defined them. b) A contract the performance of which involves the performance of a

continuous duty which the court cannot supervise is not specifically enforceable. c) No contract to refer present or future differences to arbitrations hall be specifically enforced save as is provided by the Arbitration Act (1940). But if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) has refused to perform, it sues in respect to any subject which heads contracted to refer the existence of such contract shall bar the suit. The reason is 'that parties shaft not be allowed to have their own form of tribunals unless permitted by the law of arbitration. f) Specific performance cannot be granted to a contract which cannot be enforced at the option of only one of the parties Specific performance of a contract besides other things requires mutuality, Mutuality means that the contract must be mutually enforceable by one party against another. It means each party have the freedom to enforce his rights under the contract against the other.

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Exceptional circumstances:

There are some types of contracts, where specific performance has been granted by the courts upon the assumption that damages would not afford adequate relief. The following exception is provided under sec. 14(3).

(i) Where the suit is for the enforcement of a contract to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once specific performance is permissible. Where only a part of the loan has been advanced the lender must be willing to advance the remaining part of the loan in terms of the contract.

(ii) It can be enforced in the case of a contract to take up and pay for any debentures of a company. It may be noted here that though Sec. 122 of the Companies Act provides the same remedy, it is provided here for comprehensiveness.

(iii) It may also relate to a suit which is for the execution of a formal deed of partnership, if the parties have commenced to carry on the business of partnership or for the purchase of a share of a partner in a firm.

(iv) Sec. 14 (3) (c) provides for specific performance in a suit for the enforcement of a contract for the construction of any building or the execution of any work on land provided that the following conditions are fulfilled namely;

(a) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

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(b) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(c) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

10.3.4. DISCRETION AND POWERS OF COURT :

It has been recognized that to declare performance is a matter of discretion. But this does not however, mean that the court is bound to grant such relief merely because it is lawful to do so. In one case, **Camber J.** observed that 'getting a specific performance is not to be claimed as a matter of right. It is in the discretion of the court and will not be done unless complete justice can be done by the party seeking it.' But the discretion in the matter of decreeing specific performance is not arbitrary but sound and reasonable guided by judicial principles.

These guiding principles are incorporated in Sec. 20 of the Specific Relief Act, 1963 which reads as follows: "The jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of Appeal".

The principles enumerated under sec. 20 are not deemed to be exhaustive but they are only illustrative. To quote Pomeroy. "It is not possible to lay down any rules and principles which are of absolute obligation and authority to all cases and therefore, it would be a waste of time to attempt to limit the principles or the exceptions which the complicated transactions of the parties, and the ever changing habits of society may at different times, require the court to recognize and consider. But from decided cases, in the following circumstances conditions and incidents may be deduced to be the factors to be taken into consideration, "the contract must be certain, unambiguous, mutual and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation; imposition or surprise note in unconscionable or hard. bargain, and its performance not oppressive upon the defendant, finally it must be capable of specific execution through a decree of court

Discreation to decree :

The court may properly exercise discretion to decree specific performance in any case where plaintiff has done substantial acts or suffered losses in

consequence of a contract capable of specific performance. (sec. 20, clause. 3). The contract must be in accordance with other principles which are capable of specific performance. In such a case, if the defendant has permitted the plaintiff to treat that as binding and in pursuance of that the latter has done positive acts the defendant shall not be allowed to go behind.

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Discretion not to decree : [(sec. 20 (2)]

Section 20 clause 2 provides that the following are the cases in which the court may properly exercise discretion not to decree specific performance.

a) Where the terms of contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an "unfair advantage" over the defendant, the court may properly exercise discretion not to decree specific performance. e.g. A contracts to sell, and B contracts to buy certain land. To protect that land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance and A conceals it from him. Specific performance of the contract should be refused to A.

b) Where the performance of the contract would involve some hardship on the defendant which he did not foresee, where as its-performance would involve no such hardship on the plaintiff; Mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature shall not be deemed to constitute an unfair advantage or hardship as contemplated above. The question whether the performance of a contract would involve hardship and the defendant shall except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract. Two principles are appended as explanations to sec. 20(2).

(c) Where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance. "Inequitable" is to be judged according to the merits of the case.

Mutuality :

The principle underlying the doctrine of mutuality implies that a party to a contract should not be held liable under a contract when he himself cannot enforce it against the other. A contract to be specifically enforceable must be such that it might be enforced by either of the parties against the other of them.

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As pointed out by Halsbury, "the material time when the mutuality has to be looked into is not the time when the contract was entered into but the time when the contract was sought to be specifically enforced". Thus, one of the considerations that weighs with the court when it is called upon to grant specific relief is whether the defendant in his turn could have specifically enforced the obligations cast upon the plaintiff by the agreement. This doctrine is not incorporated in the Indian Specific Relief Act and the rule as such is not observed here. Sec. 20(4) lays down as follows". The court shall not refuse to any party specific performance of a contract merely on the ground that, the contract is not enforceable at the instance of the other party.

Liquidation of damages – No bar :

Liquidation of damages not a bar to specific performance. A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court having regard to the terms of the contract and other attending circumstances is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

When enforcing specific performance under this section the court shall not also decree payment of the sum so named in the contract, (Sec. 23). From this, it is reasonably clear that a contract may be specifically enforced though a sum be named in it as the amount to be paid, in case of its breach. The party in default may be ready and willing to pay that sum specified. It is however essential that the contract must be one which is otherwise specifically enforceable.

10.3.5. PARTIES IN RELATION TO SPECIFIC PERFORMANCE :

Section 15 to 19 enumerate the rules with reference to the persons affected by the contract, that is, the person for or against whom contracts otherwise enforceable, may or may not be enforced.

a) Who may obtain specific performance : (sec. 15)

Sec. 15 of the Specific Relief Act says that specific performance of a contract may be obtained by the following persons:

(a) any party thereto the contract.

(b) the representative in interest or the principal, of any party to the contract provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, to his representative in interest or his

principal shall not be entitled to specific performance of the contract. But it may be permissible if such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

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(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled there under;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman,

(e) a reversioner in possession, where the agreement is a covenant entered into which his predecessor in title and reversioner is entitled to the benefit of such a covenant;

(f) a reversioner in remainder, where the agreement is a covenant and the reversioner, is entitled to the benefit there of and will sustain material injury by reason of its breach;

(g) when a company has entered into a contract and subsequently become amalgamated with another company, the new company which arises out of the amalgamation;

(h) when the promoters of a company have, before its incorporation entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, of the company (It is essential that the company has accepted the contract and has communicated such acceptance to the other party to the contract).

The general rule with regard to suits to enforce specific performance is that the parties to the contract, or their representatives are the necessary and sufficient parties to the suit and that all the parties to the contract should be parties to the suit and no one else.

Persons in whose favour specific performance may not be enforced: Under Section 16, specific performance of a contract cannot be enforced in favour of person;

(a) Who would not be entitled to recover compensation for its breach or

(b) Who has become incapable of performing, or violates any essential term of the contract, that on his part remains to be performed, or acts in fraud of the contract or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract or

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(c) Who fails to avert and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than the terms of performance of which has been prevented or waived by the defendant. Where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court. The plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true consideration.

Under section 17, a contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor

a) who has contracted to sell or let the property knowing himself not to have any title to the property. This rule is made applicable to person

b) who, though entered into the contract believing that he had a good title to the property, cannot at the fixed time by the parties or by the court for the completion of the sale or letting, give the buyer or lessee title free from reasonable doubt.

(b) Against whom contracts may be specifically performed

The persons against whom specific performance of contract may be enforced are enumerated under Sec. 19 of the specific relief Act, 1963. Subject to the other provisions regarding specific performance, the courts can grant specific performance against the following persons.

a) Either party to the contract,

b) Any other person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

c) Any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendent.

d) When a company has entered into a contract and subsequently amalgamated with another company, the new company which arises by amalgamation with another.

e) When the promoters of a company have, before its incorporation of the company entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation of the company; provided that the company has accepted the contract and communicated such acceptance to the other party to the contract. Sec. 19 is a counter part of sec. 15 enumerating classes of possible defendants to a specific performance suit who were not original

parties to the contract, as that section viz., Sec. 15 enumerated classes of possible plaintiffs.

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10.3.6. SPECIFIC PERFORMANCE OF PART OF CONTRACT

The general rule of equity is that the court will not compel specific performance of a contract unless it can enforce the whole contract. 'In other words, the court of equity will not enforce performance of part of a contract. Romolly, M.R. in **Merchants Trading Vs. Banvay. (1871 (12EQ)** observed that "the court cannot specifically perform the contract piecemeal, but it must be performed in its entirely if performed at all". This rule of law incorporated under sec. 12 (i) of Specific Relief Act which lays down as follows: "The court shall not direct the specific performance of part of a contract except in cases coming under one or the other of the three proceeding sections". The rationale underlying in this general principle is that the parties when they entered into a contract do not contemplate a partial performance of it. It therefore follows that equity requires that if there is to be specific performance, it should be that of the contract in its entirely. The court should obtain from remodelling the contract. But certain exceptions invariably follow this general rule and these exceptions proceed upon the principle that "equity look to the substance of contract and requires substantial compliance with its conditions rather than its literal fulfillment". These exceptions are enumerated in Sec. 12(2), (3) and (4) of the Specific Relief Act.

Sec. 12(2) of the Specific Relief Act:

Where a party to a contract is unable to perform the whole of his part of contract but the part which must be left unperformed, stands on a separate and independent footing from another part of the same contract, which cannot or ought not to be specifically performed, the court may direct specific performance of the former part". Explanation : For the purpose of this section, a party to a contract shall be deemed to be unable to perform the whole of this part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.

10.3.7. POWER TO AWARD COMPENSATION IN CERTAIN CASES :

Under Sec. 21 of the Specific Relief Act provides that in the following cases the court can grant damages or compensation in addition to specific performance.

(1) In a suit for specific performance of contract, the plaintiff may also claim compensation for its breach either in addition to, or in substitution of such performance.

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(2) If, in any suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. The circumstances that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in Sec. 73 of the Indian Contract Act.

(5) No compensation shall be awarded unless the plaintiff has claimed any such compensation in the plaint; provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint, on such terms as may be just, for including a claim for such compensation.

10.3.8. SALE OR LEASE WITH IMPERFECT TITLE :

Sec. 13 enumerates the rights of a purchaser or lessee against a person with no title or imperfect title. Where a person contracts to sell certain immovable property with no title or only with an imperfect title thereto, the purchaser or lessee, subject to the other provisions of this chapter has the following rights;

(i) if the vendor or lessor has subsequent to the contract acquired any interest in property, the purchaser or lessee, may compel him to make good the contract out of such interest. The most illustrative case law on this point is **Kalyanpur lime Works Vs. State of Bihar (A.I.R. 1954 S.C. 165)**. 'A' agreed to grant a lease to B for 20 years from 1934, believing that prior lease in favour of C has been terminated by forfeiture. In a suit brought by C, it was found that C's lease was to subsist till 1948. A got possession of the lease while another lease subsisted. It was held that B was entitled to get the lease for the remainder of the term since 1948. (i.e.) for six years from 1948 to 1954 provided he relinquished all his claims to further performance;

(ii) Where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such conveyance;

(iii) Where the vendor professes to sell unencumbered property but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right or redeem it, the purchaser may compel him to redeem the mortgage and to claim a valid discharge, and where necessary, also a conveyance from the mortgagor;

(iv) Where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit. if any with interest and costs of the suit, and to a lien on such deposit, interest and costs. If any, of the vendor or lessor in the property which is the subject matter of the contract (Sec. 13). These rules given above are applicable to contract for the sale or hire of movable property.

10.4. RECTIFICATION OF INSTRUMENTS

Section 26 of specific Relief Act deals with rectification of Instruments. The term 'instrument' has been defined in section 2 (14) of the Indian stamp Act. Accordingly, the term 'instrument' includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded.

According to section 26, an instrument may be rectified when through fraud or a mutual mistake of the parties, a contract or other instrument in writing (other than the articles of association of a company) does not express their real intention. Rectification of a contract can be granted when the contract does not represent the real intention of the parties on account of fraud or mutual mistake of the parties. If the real intention of the parties is correctly recorded, there is no scope for rectification. Articles of Association of a company cannot be rectified by a court even though they do not concur to the intention of the signatories. It can be rectified only by a special resolution in the manner prescribed by the companies Act.

Mistake

The mistake to form a ground for the relief of rectification must be mutual and not unilateral mistake. In **Frederic Rose (London) Ltd .Vs. Wom: Prin junior &co Ltd (1953),** there was a written contract for sale of horse beans. The buyers really wanted a special medium size variety of the horse beans. So, they sought for the remedy of rectification. It was held that the contract correctly represented the agreement and so there was no scope for rectification on the ground of unilateral mistake.

The mistake may be either of fact or of law. But generally, the court will not grant relief against mistake of law except where the mistake results in an inequitable result.

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In **United States of America.Vs. Motor Trucks Ltd, (1924) AC 196,** there was a contract by which title to certain property of the company was to vest in the government of America. By the mistake of both parties, one building was omitted to be mentioned in the schedule of property, though it was intended to be covered by the contract. So, the American government sought rectification of the contract. It was held that the contract could be rectified on the ground of Bilateral mistake of fact.

According to section 26 (1), Rectification may be claimed in anyone of the following ways :

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff in any suit in which any right under the instrument is in issue may claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit may in addition to any other defence open to him, ask for rectification of instrument.

Illustration :

'A' intending to sell to 'B' his house and one of the three godowns adjacent to it, executes a sale deed prepared by B, in which through B's fraud, all the three godowns are included. Here, 'A' can file a suit for rectification of the said instrument (i.e sale deed) in respect of the fraud related to the godown retained by 'B'.

The court shall direct rectification of a contract or another instrument so as to express the real intention, as far as possible, without prejudice to rights acquired by third person in good faith and for value.

A contract in writing may first be rectified, and then if the party claiming rectification has also prayed for specific performance, in his pleading and if the court thinks fit, may order for specific performance of the contract. The relief of rectification of an instrument shall be granted to any party only if it has been specifically claimed by a party. When a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

Granting the relief of rectification of instrument is purely discretionary power of the court and it shall be granted only if the court finds that the instrument does not express the real intention of the parties through fraud or mutual mistake of parties and the court must be satisfied that all the parties to the contract intended

to make an equitable agreement. Moreover, the burden of proof of fraud or mutual mistake of parties lies on the party who seeks the relief of rectification of instruments.

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10.5. RESCISSION OF CONTRACT

Section 27 to 30 of the specific Relief Act, deal with rescission of contracts. Rescission is a form of specific relief by which the plaintiff claims for the avoidance of a contract. Rescission means 'avoidance of a contract'. In other words, it means putting an end to a contract. Rescission can be claimed only if the contract is void able. The object of rescission is to annul or putting an end to the contract and restore the contracting parties to their original positions in which they stood at the time of contract. This remedy is not applicable to void contracts and the rescission of contract constitutes a bar to its performance by either of the party to it.

Any person interested in a contract may sue to have the contract rescinded. He may be a party to the contract or a third party who is a beneficiary or interested person in contract.

The Rescission may be adjudged by the court and under section 27 (1) the rescission may be granted by the court in the following cases.

(i) Where the contract is voidable at the option of the plaintiff or terminable by the plaintiff (ie) it is affected by coercion, fraud, misresentation or undue influence.

(ii) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

Illustration to sec 27 (1) (a)

'A' sells a field to 'B'. There is a right of way over the field of which 'A' has direct personal knowledge, but which he conceals from B. 'B' is entitled to have the contract rescinded.

Illustration to section 27 (1) (b)

'X' an advocate induces his client 'Y', a Hindu widow, to transfer her property to him for the purpose of defrauding 'Y's creditors. Here, the parties are not equally in fault, and 'Y' is entitled to rescind the contract. (ie) to cancel the instrument by which transferring her property to the advocate 'X'.

The relief of rescission is available subject to very important limits. Now, let us see some case laws relating to rescission of contract.

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In **All-kard .Vs. Skinner (1887),** (which is already referred in earlier chapter), it was held that where a contract, which have been induced by undue influence the aggrieved party may sue for rescission.

In **Krishnaji. Vs. Ramachandra (1932) Bom.51,** where the defendant agreed to sell his land to the plaintiff. The land was described as Govt leasehold tenure in perpetuity renewable at the expiration of every 50 years, the same having been renewed about one year prior to the agreement. On investigation, it was found to be a newly assessed land. So, the plaintiff filed a suit for rescission of contract. It was held that the vendor could rescind the contract as he could not be considered to be purchasing what was really the subject matter of the contract for sale.

In **Pethe Perumal.Vs. Muniyandi, 35 cal 551, (p.c.)** 'A' contracts to transfer certain property to 'B' and the purpose of the transfer is to defraud A's creditors. The object of the contract is illegal. Before the illegal object is carried out, 'A' may rescind the contract.

Limitations

There are certain limitations to the remedy of rescission. These limitations to the right of rescission are enumerated in section 27 (2). According to this section 27 clause (2) the court may refuse to rescind the contract

(a) Where the plaintiff, has expressly or impliedly ratified the contract; or

b) Where owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself) the parties cannot be subsequently restored to the position in which they stood when the contract was made; or

c) Where third parties have during the subsistence of the contract acquired rights in good faith without notice and for value or

d) Where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

10.5.1. RESCISSION IN CERTAIN SALE OR LEASE WHERE SPECIFIC PERFORMANCE IS DECREED (SECTION 28)

Where the court has passed a decree for specific performance in respect of a contract for sale or lease of immovable property, but the purchaser or lessee who obtained such relief does not pay the price or make any default in payment

within the time limit allowed by the court, the seller or lesser may apply for rescission of contract. [Sec. 28(1)].

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For example, 'A' obtains a decree against 'B' for specific performance of a contract to sell an immovable property. By the decree 'B' has to pay the price on or before 10.2.2009. 'B' defaults in payment. In this case, under section 28 (1), the seller can seek the remedy for rescission of contract by filing a separate suit.

When the contract is rescinded under section 28.

(a) The court shall direct the purchaser or the lessee to restore possession of the property to the seller or lessor if he has obtained such possession under the contract.

(b) The court may also direct payment to the vender or lessor, of all the rents and profits which have accrued in respect of the property for the period during which the purchaser or lessee enjoyed the benefits of possession (ie) from the date of possession until restoration of possession.

(c) If justice requires, the court may also order the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract. [section 28 (2)].

10.5.2. INCIDENTAL RELIEFS :

Under section 28, clause (3), if the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the prescribed period, the court may award such party, some additional and further reliefs also. On application made in the same suit, the court may award the purchaser or lessee further relief like (a) the execution of a proper conveyance by the vendor or lease by the lessor (b) the delivery of possession or partition and separate possession of property on the execution of such conveyance or lease. According to section 28 (4), 'No separate suit in respect of relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.' The costs of the proceedings under this section shall be in the discretion of the court. [(section 28 (5)].

10.5.3. ALTERNATIVE PRAYER FOR RESCISSION

According to Section. 29, the plaintiff instituting a suit for specific performance of a contract in writing, may ask for the alternative prayer of rescission of contract. If the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled and the court, if refuses to enforce the contract specifically may direct it to be rescinded accordingly.

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10.5.4. EXTENSION OF TIME

Where the court, while ordering specific performance in favour of the plaintiff directing him to pay the balance amount within a specified time and the plaintiff make default in payment, then the court could grant him extension of time to pay that balance amount. In **Ramankutty Guptan.Vs. Abara, AIR (1994) S.C. 1701,** where the appellant filed a petition to rescind his contract on the plea that the respondent committed default in depositing the balance consideration money, it was held that when the decree specifies the time for performance, on its failure to deposit the money, the court has the power to extend time".

10.5.5. RESTORATION OF BENEFITS

Section 30, lays down that the court may require the parties rescinding the contract to do equity. It is a legal maxim that "he who seeks equity must do equity". Under section 30, 'when a contract is rescinded, the court may require the party to whom the relief of rescission is granted to restore any benefit, which he may have received from the other party under the contract and to make any compensation to him, which justice may require.'

Section 64 of the contract Act also requires the party who rescinds to restore any benefits which he may have received from the defendant under the contract.

The purpose of the relief is not punishment, but compensation.

Rule in Seddon .Vs. N.E. Salt Co. (1905 lch 326)

In English law, another limitation to rescission has been evolved by the courts. The ruling laid down in this case is that the right to rescind a contract on the ground of innocent misrepresentation as distinguished from fraudulent misrepresentation would be lost if the contract had been followed by a completed conveyance. It has been criticized by jurists and has been later discarded in cases of contract to take shares, executed contract of guarantee, except where land is concerned, the rule is of doubtful validity. It is of great importance to refer to Indian law with reference of Transfer of Property Act in particular where the sale deed is voidable because of material defect in the vendor's title which is not disclosed by the vendor, such non disclosure amounting to fraud under section 55 of the T.P. Act. In such case, the plaintiff may bring the suit for rescission of the sale deed and for the return of the sale price. Rescission can be allowed not only for sale but also for completed conveyance.

While directing the rescission of contract, the court has discretionary power to provide for compensation. Compensation is measured on the same lines

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on which damages in the case of breach of contract is assessed and the plaintiff must adduce sufficient evidence with regard to the damage suffered by him on account of rescission of contract.

In **Vasudeo Harchand Kothe. Vs. Bhabulal Singh, Rajput, AIR 1994, Bom. 124,** the plaintiff entered into an agreement for the purchase of land and filed a suit for specific performance. During pendency of suit, the property was sold to a third person. It was held that in the absence of the plaintiff adducing evidence as regards the quantum of damage, the plaintiff is only entitled to nominal damages.

10.6. CANCELLATION OF INSTRUMENTS

Sections 31 to 33 of the specific Relief Act. 1963 provide for the cancellation of instruments. It means 'nullifying a document' (instrument). The term instrument means not only in the contract but also all kinds of document.

Under section 31 clause (1), Any person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument if left outstanding may cause him, serious injury may sue to have it adjudged as void or voidable and the court may, in its discretion adjudge it and order it to be delivered up and cancelled. (Sec. 31)

Illustration : (1)'A' makes a gift of land to 'B'. 'B', bequeaths it to 'C' by his will. 'B' dies, 'C' is now entitled to the land. But 'D' gets into possession and produces a forged instrument which purports to be a transfer by 'A' to 'B' in trust for 'D'. 'C' may obtain the cancellation of this forged trust deed.

(2) 'A', the owner of a ship, by fradulently representing her to be sea-worthy, induces 'B' an insurance agent, to insure her. Here, 'B' may obtain an order for cancellation of the insurance policy.

Sec. 31 is equally applicable to registered instrument and the court cancelling it, shall send a copy of its decree to the officer in whose office, the instrument has been registered, and such officer shall note on the copy of the instrument contained in his books about the fact of its cancellation. [(sec. 31(2)].

In **Anglo Danubian Co. Vs. Rogerson (1867),** the defendant agreed to sell and deliver a ship to the plaintiff, and the plaintiff paid Rs. 30,000/- by way of four bills of exchange to be drawn by the defendant or plaintiff. The bills are drawn and accepted, but the ship was not delivered according to the agreement. So, the plaintiff sued against the defendant for cancellation of the bills. It was held that the plaintiff may obtain the cancellation of all the bills.

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10.6.1. CONDITIONS FOR CLAIMING THE RELIEF :

In order to get cancellation of an instrument, the plaintiff must make out the following things.

(i) that the instrument is void or voidable as against the plaintiff.

(ii) that he has reasonable apprehension of injury from the instrument if it is left outstanding.

(iii) that the threatened injury is serious.

Cancellation of instrument may be obtained even by persons who are not parties to a document.

10.6.2. PARTIAL CANCELLATION OF INSTRUMENT

Under section 32, where an instrument is evidence of different rights or different obligations, and the plaintiff has apprehension of injury only from a part of document, then the court may, in a proper case, at its discretion cancel that part of the instrument or document and allow it to stand for the residue (ie) the remaining part).

If the rights or obligations under the instruments are not separable as injurious and non-injurious, then partial cancellation cannot be possible.

Illustration :

'X' executed a mortgage deed infavour of 'Y'. 'X' gets back the deed from 'Y' by fraud and endorses on it, a receipt of Rs. 5000/- purposing to be signed by 'X'. Here, Y's signature is forged. So, 'Y' is entitled to have the endorsement cancelled and leaving the remaining part of the mortgage deed to stand in other aspects.

Under section 33, the party getting cancellation may be ordered to restore any benefit which he might have received from the other party under the instrument and to make compensation to him which justice may require. The rule of restoration can be applied against the defendant who successfully resists any suit on the ground that the instrument sought to be enforced against him is voidable.

It may further be noted that the relief by way of cancellation is founded upon the principle of administration of productive justice for fear. Technically it is known as **"quia timet"** (for fear). To quote Story, "The party is relieved upon the principle, as it is technically called quia timet, that it is for fear that such agreement, securities, deeds or other instruments may be vexatiously or injuriously

used against him, when the evidence to impeach may be lost, or they may now throw a cloud of suspicion over his title or interest". Rescission is ordered in cases where the contracts are voidable while cancellation can be made in any case whether the instrument is void or voidable and it is sufficient if there is reasonable apprehension of serious injury or danger.

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10.6.3. MINORS AGREEMENT AND RESTORATION :

When a minor who had fraudulently misrepresented his age seeks to set aside the transaction on the ground of minority, the court shall direct the refund of money received by the minor as a condition for cancellation of the deed.

In Mohori bibi. Vs. Dharmadas Ghose (1903)

A minor, declaring himself as major, mortgaged his two houses for Rs. 20,000/- and the mortgagee paid Rs. 8000/- as partial payment. The minor, then filed a suit for cancellation of the mortgage deed. Under the provisions of section 33, the court is authorised to require a minor to restore the benefits or make compensation. But in the present case, the Lordships cancelled the mortgagee deed but they did not require the minor to make any compensation to the mortgagee because he was reckless in his dealings with the minor.

Limitation

Article 59 of the limitation Act, 1953 prescribes a limitation period of 3 years for a suit for cancellation of instrument.

10.7. DECLARATORY DECREES

Section 34 and 35 lay down the law relating to declaratory decrees. A declaratory decree is a decree declaring of a right which is doubtful or which requires to be cleared. The object of declaratory decrees is to prevent future litigation by removing the existing cause of the controversy. A cloud on title can be effectively removed by means of a declaratory decree.

Before the specific Relief Act, 1877, declaratory relief in India was governed by section 15 of the civil procedure code, 1859.

Section 34 of the specific Relief ct lays down the circumstances under which a declaratory decree may be passed. It confers discretionary power to the court to grant declaration of status or right.

Any person entitled to any legal character or to any right as to any property may institute a suit against any person denying or interested to deny his title to character or right and then the court may in its discretion make therein a

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declaration that he is so entitled and the plaintiff need not in such suit ask further relief. But the court shall not make such declaration where the plaintiff being able to see further relief than a mere declaration of title, omits to do so.

From the above principles it is evidently clear that declaratory decree is a mode of relief where there is no specific performance and no award of compensation. This is only a declaration of the right of the parties without any consequential relief which can be enforced by the execution of the decree. Further the declaration does not confer any new right upon the plaintiff, it merely declares what he had before.

The object of granting such decrees is that where a person's status or legal character has been denied or where a cloud has been cast upon his titles to rights and interest in some property he may have removed by having his legal status or rights declared by the court. Again, this section aims to perform adverse attacks. A declaration made under Sec. 34 of the Specific Relief Act is binding only on the (1) parties to the suit, (2) persons claiming through them respectively; and (3) Where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees (Sec. 35).

The following elements are essential to maintain a suit for declaration.

(i) It is essential for a decree under section 34, that the plaintiff must be entitled to any legal character to any right to property. Legal character is a position recognised by law. It means something like status (e.g) Adoption, Marriage, legitimacy etc, and a person's legal character is made up.

In Ram Das .Vs. Salim Ahmed (1998) 9 Sec, 719, it was held that weakness in defendants claim for tile to the property cannot establish plaintiff's title and the plaintiff was not entitled to get declaration of title, if such title could not be established by him by convincing evidence.

(ii) The defendant should have denied or be interested in denying plaintiff's title to such legal character or property (i.e) there must be some danger or threat to the interest of the plaintiff.

(iii) The plaintiff is not in a position to ask for consequential relief upon the declaration to his title. If on the basis of the declaration, some consequential relief can also be sought, such relief should be prayed for. Otherwise the suit would be dismissed.

A suit for declaration will not lie in the following cases.

(i) Where there is no substantial injury to the plaintiff.

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(ii) Where the defendant has never denied the title of the plaintiff or his legal character.

(iii) Where the plaintiff who is in a position to claim further relief has omitted to claim the further relief.

(iv) Where the plaintiff's conduct in claiming declaration is fraudulent.

Illustrations :

(i) 'A' is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. 'A' may sue for a declaration that they are not entitled to the right so claimed.

(ii) 'A' is possession of certain property. 'B' alleging that he is the owner of the property, requires 'A' to deliver it to him. 'A' may obtain a declaration of his right to hold the property.

In Shiv Charan .Vs. Sukh Ram. (AIR 2003 NOC 251 (P&H), The defendant claimed permanent lease and ownership, the lease had expired, but the defendant continued in possession even after expiry of lease period. It was held that the acquisition of ownership by the plaintiff under gift deed was not disputed and therefore the plaintiff was entitled to declaration of ownership and possession.

Effects of declaration :

Section 35 lays down that a declaration made under this provision (Sec.34) is binding only (i) on the parties to the suit. (ii) persons claiming through them respectively (e.g) reversioners, widows and sons etc and (iii) Where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

10.8. PREVENTIVE RELIEF

(Injunctions)

Preventive relief is a mode of specific relief. When the court prevents a party from doing that which he is under an obligation not to do, it is said to be preventive relief. Preventive relief is granted in the form of an Injunction.

Definition :

Lord Halsbury has defined "An Injunction is a judicial process whereby a party is ordered to retrain from doing or to do a particular act or thing."

It has been defined by **Joyce** as "An order remedial, the general purpose of which is to retrain the commission or continuance of some wrongful act of the party informed."

Check Your Progress Questions

6. What is meant by preventive relief?

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There are three characteristics of an Injunction.

(i) it is a judicial process

(ii) the relief obtained is a restraint or prevention.

(iii) the act restrained or prevented is wrongful.

Granting of an Injunction is subject to the provision of the specific Act While the court exercising its discretionary power in granting an injunction, equitable considerations should invariably by the guiding factor.

An injunction may be issued for and against individuals, public bodies or even the state. Disobedience of an injunction is punishable as contempt of court.

An Injunction will not be issued.

(i) Where damages are the appropriate remedy.

(ii) Where injunction is not the appropriate relief.

(iii) Where the contract cannot be specifically enforced.

(iv) Where the plaintiff is not entitled to an injunction on account of his conduct.

(v) Where the injunction would operate inequitably.

Injunction when refused [sec. 41]

Section 41 of the Act specifically enumerates the cases in which an injunction cannot be granted. An injunction cannot be granted;

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceeding;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e) to prevent the breach of a contract, the performance of which would not specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be nuisance;

(g) to prevent continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly obtained by any other usual mode of proceeding except in case of breach of trust.

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) when the plaintiff has no personal interest in the matter.

The following case law will be helpful in understanding the principles underlying the issue of mandatory injunctions. **Aiyasami Aiyer Vs. District Board Tanjore (31 Mad 17)** Where the construction of certain, works by the District Board was found necessary in the interest of the public, it was, held that suit for injunction or damages could be brought against them for an injury caused to any person by reason of such construction.

Section 36 provides that, "preventive relief is granted at the discretion of the court by injunction, temporary or perpetual"

Granting Injunction is the discretionary power of the court and Injunctions are either temporary or (interlocutory) or perpetual.

Kinds of Injunctions :

(i) Temporary and perpetual injunctions (Sec.37)

Section 37(i) defines, "Temporary injunctions will continue until a specified time or until further order of the court and it may be granted at any stage of a suit, and are regulated by the code of civil procedure."

The procedure for granting temporary injunction is granted by the rules laid down in order 39 Rules 1&2 of Civil Procedure Code.

Temporary Injunction is an order of a court to do the rightful action to prevent from doing a wrongful act for a specified period or till the next order of the court.

For Example :

There is a dispute between A & B regarding the title of a land. Now, 'A' makes an attempt to sell that land to 'C'. 'B' can get a temporary injunction to prevent 'A' from selling the land till the true owner is decided by the court. This injunction may be granted at any stage of the suit. It may be even in initial stage of the proceedings and it may be revoked by a subsequent court order.

Perpetual Injunction :

Section 38 of the Act lays down that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the plaintiff. When

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Check Your Progress Questions

7. When a mandatory injunction granted?

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any such obligation arises from contract, the rules contained in sec.9 to 25 of Specific Relief Act relating to a specific performance also govern the grant of injunction. Sec. 38 clause 3 provides that, 'when the defendant invades or threatens to invade the plaintiff is right or enjoyment of property, the court may grant perpetual injunction in the following cases, namely,

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion,

(c) Where the invasion is such that compensation in money would not afford adequate relief;

(d) Where the injunction is necessary to Prevent a multiplicity of judicial proceedings.

Mandatory Injunction :

Sec. 39 of the Act lays down that 'when to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may, in its discretion, grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.'

The following illustration will make the point quite clear, (a) A builds a house with eaves projecting over B's land B may sue for an injunction to pull down so much of the eaves as so projects (b) A being B's medical adviser demands money of B which B declines to pay A then threatens to publish B's written communications with him showing that B has lad an immoral life. B may obtain an injunction to restrain the publication.

Thus a mandatory injuction is a command to undo that which has been done or to do a particular act to restore things to their former condition. Sometimes this term mandatory injunction is employed to distinguish it from prohibitory injunction. While a prohibitory injunction forbids from doing a wrongful act which would be an infringement of some right of the plaintiff legal or equitable, a mandatory injunction is a commend to undo that which has been done or to do a particular act to restore things to their former condition.

Damages in Lieu of Injunction :

In England, after passing the Judicature Act of 1873, it has been a well established law that in an action for injunction, both injunction and damages may be obtained in the same court for the same action. They are no longer alternative remedies. Surprisingly, there has been no corresponding provision in

the old Specific Relief Act. The need for incorporating this parallel provision of law was keenly felt and now specific provision is made in the new Act. By sec.40

1. the plaintiff, in a suit for perpetual injunction under Sec, 38 or mandatory injunction under Sec. 39 claim damages either in addition to or in substitution for such injunction and the court may if it thinks fit award such damages.

2. No relief by way of damage shall be granted under this section unless the plaintiff has claimed such relief in his plaint provided that the court shall allow amendment at any stage

3. The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bear his right to sue for damages for such breach.

Performance of a Negative agreement [sec. 42]

Section 42 lays down that where a contract comprises affirmative agreement, to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, and the circumstances are such that the court is unable to compel specific performance of the affirmative agreement, it may grant an injunction to perform negative agreement provided that the applicant has not failed to perform the contract so far as it is binding on him.

Now we can resume to note down the important decision which adopts the rule contained in sec. 42, **(Lumly .Vs. Wagner (1852 De) G.M. & M 604)** : In this case Miss Wagner agreed to sing at L's theatre in London for three months from April 1st and not to sing anywhere else during the period. Afterwards she entered into a contract to sing at another theatre and refused to perform her contract with L. The court refused to enforce her positive agreement to sing at L's theatre by specific performance but granted an injunction restraining her from singing at any other theatre there by preventing breach of the negative part of the agreement through the positive part of it, being a contract for personal service could be specifically enforced. The application of Sec.42 is invoked : "notwithstanding anything contained in Cl. (c) of Sec.41" lays down that an injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced.

It is perfectly clear that rule stated above will not apply in the absence of clear negative terms express or implied. An illustration of this principle, we can cite the case of **Whitwood Chemicals Co. Vs. Hardman (1891 2 Ch 416)** : In this case, the manager of a manufacturing company had agreed at the time of his

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employment "to give the whole of his time to the company's business during the term of his service". It was held that the company could not have an injunction to prevent him from giving part of his time to a rival company because there was no express negative stipulation in the contract to that affect. Again, here an injunction will not be granted. for its inevitable result would be to compel the manager to work for the company or other wise to starve. It is one thing to tempt him to perform the contract, another to subject him to irresistable compulsion. On the other hand, if A agree to serve B as a film actress and not to act for another film company, an injunction will be granted forbidding her to break the negative stipulation. In this case she is not faced with the alternative of starvation or of service with B since there are many other ways in which she may earn a living (**Warner Brothers Pictures incorporated .Vs. Nelson (1937 I. B. K. 209).**

10.9. SUMMARY

In this unit you have studied a new Act, viz, specific Relief Act, 1963, apart from Indian contract Act. Specific Relief means the relief in specific. It can be granted only for the purpose of enforcing individual civil rights. From the above discussion we hope that you have understood the provisions of specific Relief Act 1963. This unit describes the meaning and nature of specific relief and various methods or modes by which the specific relief is granted under this Act. The important concepts of recovery of possession of property, specific performance of contract, Rescission of contract, and preventive relief etc are elaborately discussed with recent cases. Moreover, we have referred lot of case laws and illustrations for your easy understanding.

10.10. KEY WORDS

1.	Discretionary	-	Determined by prudence; Having special power within legal limits.
2.	Ejectment	-	Force someone to leave a place; send out something with force.
3.	Equity	-	justice; the quality of being equal
4.	Injunction	-	An order or judgement by which a party to an action is required to do or refrain from doing a particular thing.
5.	Interlocutory	-	Interim; A proceeding in an action is said to be interlocutory when it is incidental to the principal object of an action.

6.	Instrument	-	Document
7.	Forbear	-	to abstain; to avoid; to hold back from.
8.	Mandatory Injunction	-	Injunction ordering a person to do a thing
9.	Obviate	-	To make not necessary; supervene
10.	Ouster	-	Dispossession
11.	Primafacie	-	At first instance; at first sight
12.	Repeal	-	The revocation of a statute or a part of it, by another statute.
13.	Res. judicata	-	a case or suit already decided.
14.	Title	-	certain facts or events by reason of which the right has become vested in its owner. Every legal right has a title.

10.11. ANSWERS TO CHECK YOUR PROGRESS QUESTIONS

For Question No.1 ... Refer Section No. **10.1**

Question No.2 ... Refer Section No. **10.1.1**

Question No.3 ... Refer Section No. **10.3**

Question No.4 ... Refer Section No. **10.3.2**

Question No.5 ... Refer Section No. **10.3**

Question No.6 ... Refer Section No. **10.8**

Question No.7 ... Refer Section No. **10.8**

10.12. EXERCISE QUESTIONS

A. Short answer Questions

1. When can a court grant a declaratory decree?
2. What is a perpetual injunction? Distinguish it from a temporary Injunction.
3. **Write Short notes on**
   a) Preventive Relief
   b) Mandatory Injunction
   c) Rectification of Instrument
   d) Cancellation of Instrument
   e) Rescission of contract
   f) Delay defeats equity
4. Explain the cardinal rules relating to equity?
5. Who are the persons entitled to claim specific relief?

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B. Long answer questions

1. What is meant by specific performance? What are the various methods by which the specific Relief is granted under specific Relief Act, 1963?

2. State the provisions relating to Recovery of possession of movable and immovable property under specific Relief Act?

3. What is meant by specific performance? Enumerate the contracts which can and cannot be specifically enforced (or) when can specific performance of a contract be enforced?

4. "The jurisdiction to grant specific performance is discretionary"-Explain it with reference to the provisions of the specific Relief Act.

5. "As a general rule that the court of equity will not enforce the performance of part of a contract" - Discuss and pointout the exceptions to this rule.

6. "Preventive relief is granted at the discretion of the court by injunction temporary or perpetual"-Explain.

7. Explain how the maxims of enquiry are recognised and applied by the specific Relief Act?

8. Point out the exceptions to the general rule that a court shall not direct specific performance of part of a contract.

MODEL QUESTION PAPER
BUSINESS LAWS - I

(Space for Hints)

Time : Three hours **Maximum : 100 marks**

PART A - (5 x 15 = 75 marks)

Answer any FIVE questions

Each question carries 15 marks

1. "An offer need not be made to an ascertained person". Explain this principle referring to leading cases.
2. Past consideration is no consideration - Explain.
3. State the circumstances under which a contract is discharged by impossibility of performance.
4. What are the rules relating to recovery of specific immovable property?
5. Examine the nature of Agreements in Restraint of Trade. Refer to decided cases.
6. Explain the principles on which specific performance of a contract may be granted or may not be granted.
7. "In pari delicto potior est conditio defendantis" Discuss. Explain and point out the exemptions to this maxim.

PART B - (5 x 5 = 25 marks)

Answer any FIVE questions

Each question carries 5 marks

Write short notes on :

(a) Revocation of offer

(b) Coercion

(c) Consensus ad idem

(d) Rules relating to performance of contract

(e) Declaratory decrees

(f) Void and voidable contract

(g) Harvy v. Facie

(h) Contingent contracts